OFFICE SUPREME COURT
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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1880.

No. 186.

VERNON K. STEVENSON ET AL.,
APPELLANTS,

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR THE APPELLANTS.

Field.

Supreme Court of the United States

VERNON K. STEPHENSON
vs.
TEXAS AND PACIFIC RAILWAY CO. } No. 186.

By reading from the record, in the order of their dates, the following list of papers, a perfectly clear insight may be had into the relation between the complainant and defendant.

1. September, 1859.—Agreement between R. V. Richardson and Jeptha Fowlks, R. N. Loughrey, John Gregg, Z. P. Goodman, J. Edgar Thomson, W. T. Scott, Jason Wilson, J. C. Robinson, and J. B. Edwards. (Record 833–835.)

2. September 28, 1859.—Agreement between R. V. Richardson and Jeptha Fowlks ; pp. 835–837.

3. October 3, 1859.—Meeting of stockholders, adopting by-laws; pp. 837–845.

4. Resolution of same meeting of stockholders to elect seven directors, under article 6 of the by-laws ; p. 845.

5. Resolution at same meeting, ratifying and approving agreement between Richardson and Fowlks, mentioned in No. 2, p. 846.

6. October 3, 1859.—Directors' meeting, at which were elected a president, vice-president, secretary, and treasurer, chief engineer, general superintendent and surveyer-gen-

eral of the land department. J. Edgar Thomson elected president alternate, to take effect on the resignation of Fowlks, president-elect: various resolutions touching the general management of the business of the company ; pp. 847–851.

7. October 5, 1859.—Subscription by Fowlks of total amount of the capital stock of the New Southern Pacific Railroad Company, organized, June 1 and 2, 1858 ; p 835.

8. October 5, 1859.—Subscription by Fowlks of list of names and amount and numbers of shares opposite each name ; p. 835.

9. October 5, 1859.—Meeting of stockholders (two-thirds of all stock represented.) Resolutions that the board of directors shall have power and authority to execute mortgages, deeds of trust, and deeds of conveyance in bargain and sale of and upon the franchises, chartered rights and charter, &c., for raising, &c., means to construct the road, &c. ; p. 846.

10. October 5, 1859.—Meeting of directors ; authority to president to execute a mortgage, &c., of six millions of acres of land donated by Texas ; also, upon railroad rolling stock, stations, depots, &c., to secure payment of $25,000,000 of construction bonds ; pp. 846, 847.

11. October 8, 1859.—Meeting of board of directors ; how fees of attorneys, salaries of officers, &c., &c., are to be paid ; the president to make agreement with J. Edgar Thomson as to his salary, "when he shall accept the presidency," &c.; also appointing Louis T. Wigfall to procure patents for land due from Texas, on completing and putting in running order twenty-five miles of their road, which the resolution recites had been done, &c., &c.; pp. 851–853.

12. November 24, 1859.—Meeting of board of directors ; resolution appointing Fowlks general agent from acceptance of presidency by Thompson ; p. 853.

12*a*. June 23, 1860.—Contract made at Philadelphia between De Graff & Smith of one part, and the company, by J. Edgar Thomson, president, of the other, for building fifty miles of the railway for $13,000 per mile; pp. 933–942; ratified August 6, 1860.

13. August 6, 1860.—Meeting of board of directors. Among the various resolutions at this meeting, the third approves the mortgage or trust deed submitted to the board by Fowlks, and authorized him and V. K. Stevenson to select proper and suitable persons for trustees, have the deed executed and duly recorded; but, before the recording, the executive committee may modify, amend, and alter it; 4th, that one million of dollars of bonds, under said mortgage, may be issued, convertible into stock; 6th, that Fowlks be appointed the general and financial agent of the company; 7th, approving Fowlks' call on Thomson to resign, "under his total neglect and seeming indifference to the interests of the company and the duties of his office since the 14th of January, when he accepted it;" 8th, that his resignation is accepted for the reasons stated in the resolution; and "*resolved*, 9th, that Vernon K. Stevenson, of Nashville, Tenn., be and he is hereby appointed president of this company in place of J. E. Thomson, esq., resigned;" 18th, that Stevenson, Tate, Richardson, McDermott, and Fowlks be appointed executive committee, with all the powers of the board of directors, &c., &c.; 19th, that said executive committee shall revise, alter, or amend the financial policy, modifying and changing, at discretion, the mortgage presented to the company by Fowlks and adopted by the board, &c.; pp. 855–857. August 6, 1860.—Meeting of board of directors, ratifying contract with De Graff & Smith, pp. 942-943.

14. August 25, 1860.—Trust deed of Southern Pacific R. R. Company, by Stevenson, president, conveying to trustees Stevenson and Richardson the railway, stations and depots from the eastern to the western boundary of Texas, and all the stations and depot buildings, engine-houses, and

other improvements and constructions thereon, made or to be made; and also 9,375 sections of land, in all six millions of acres, secured to the railroad company by an act of the Texas Legislature of January 30, 1864, the whole to be held by said trustees to secure the payment of the construction bonds, the conveyance to be void if the bonds be paid; but in case of failure to pay, then the trustees to take possession of the said railroad property, and also of all the engines, tenders, cars, carriages, tools, machinery, and materials of said railroad, as if included in this deed, and take and receive the income of the railroad, and apply the same to pay current expenses, needful repairs, and then to payment of interest and principal of construction bonds, expenses, &c., rendering overplus to company. In witness whereof the company has caused its corporate seal to be affixed, and to be signed by its president and countersigned by its secretary, and the trustees, Richardson and Stevenson, have hereto set their hands and seals.

Signed, STEVENSON, *President.*
RICHARDSON, *Trustee.*
STEVENSON, *Trustee.*

D. C. WILDER, *Secretary.*

Certificate of Wilkinson, Commissioner of Texas in N. Y., of execution by Stevenson and Wilder for company, September 10, 1860.

Before same, of execution by Stevenson and Richardson, who make oath that the whole was done by order of board of directors, September 12, 1860. (Record, 29 to 41.)

15. September 1, 1860.—Meeting of board of directors; resolution that 350 construction bonds for $1,000 each, numbered from 1 to 350 inclusive, shall be issued under the provisions of the general and interest mortgages, signed by the president and treasurer, under the seal of the company, &c., &c. Signed this 1st day of September, 1860, D. C. Wilder, secretary.

16. September 1, 1860.—Construction bond No. 22 (p. 644), coupon No. 6 (p. 645), and forty-four other coupons from 7 to 50 inclusive, payable at intervals of six months; also indorsed in print, resolution authorizing issuance.

17*a*. September 11, 1860.—Articles of agreement between Stevenson as president, and Bellot de Menieres, Bros & Co., of Bourdeaux, for construction of the road. Contract No. 1, p. 627.

17*b*. September 11, 1860.—Contract No. 2, appointing Bellot de Menieres, Bros & Co., bankers of the company, p. 633.

17*c*. September 11, 1860.—Contract No. 3. Agreement for ratification of Nos. 1 and 2 by the Bourdeaux house within forty-five days after the arrival of Ernest de Bellot, his voyage to commence on September 12, p. 638.

18. November 2, 1860.—Proposal by Peabody, London, to Stevenson, to sell the company 5,000 tons of railroad iron, signed Geo. Peabody and V. K. Stevenson, pp. 640, 641.

19. November 3, 1860.—Memorandum of acceptance of this proposal, signed V. K. Stevenson, pp. 621, 622.

December 8, 1860.—Notice of cancellation of contract for 5,000 tons of rails, and sale of 1,000 tons, delivered at New Orleans by Peabody & Co. to Stevenson, with promise to send contract- p. 642, No. 1.

December 10, 1860.—Contract sent. Please confirm this and oblige yours truly, Peabody & Co.; pp. 642, 643, No. 2.

February 5, 1861.—Option to take the rails within thirty days after Stevenson's arrival in New York, if he gave notice of his desire to have them, to James Tinker of New York; pp. 643, No. 3.

March 18, 1861.—Tinker to Stevenson. Presumes Ste-

venson does not want the rails, as he has not heard from him; p. 644, No. 4.

663. August 25, 1859. Fowlks to Stevenson.
653. January 17, 1860. Same to same.
654. " 27, " Same to same.
655. March 26, " Same to same.
654. " 27, " Same to same.
656. April 3, " Same to same.
657. May 4, " Same to same.
657. " 21, " Same to same.
657. June. 16, " Same to same.
640. Septem'r 1, " See ante 15.
627 " 11, " See ante 16*a*.
633. " 11, " See ante 16*b*.
635. " 11, " See ante 16*c*.
674. " 20, " Jessup to Stevenson.
677. October 13, " Young to same.
661. " 24, " Fowlks to same.
640. Novem'r 2, " Peabody to same.
641. " 3, " Stevenson to Peabody.
660. " 3, " Fowlks to Stevenson.
642. Decem'r 8, " Peabody to Stevenson.
642. " 10, " Same to same.
643. Feb. 5, 1861. Same to same.
676. March 5, " Dial to same.
673. " 8, " Fulkerson to same.
676. " 8, " Ralston to same.
673. " 21, " Burkhart to same.
675. " 26, " Crutcher to same.
679. " 30, " Thomson to same.
677. April 1, 1861. Huger to Deas.
652. " 6, " Soutter to Stevenson.
652. " 10, " Fowlks to "
674. " 10, " Livingston to "
656. " 12, " Schuchardt and Gebard to Stevenson.

672.	"	12,	"	Holman to Stevenson.
672.	"	14,	"	Richardson to same.
671.	"	15,	"	Same to same.
664.	"	16,	"	Holman to Stevenson.
659.	"	17,	"	Fowlks to same.
670.	"	17,	"	Richardson to same.
668.	"	23,	"	Loughery to Holman.
670.	"	23,	"	Richardson to Stevenson.
664.	"	26,	"	Holman to same.
659.	"	28,	"	Fowlks to same.
670.	"	29,	"	Richardson to same.
665.	May	4,	"	Holman to same.
666.	"	9,	"	Same to same.
667.	"	11,	"	Same to same.
667.	"	20,	"	Same to same.
679.	Oct.	1,	"	Holman's Circular. See page 568 in regard to this circular, marked there ZZ.

Rec'd

United States Supreme Court.

V. K. STEVENSON,
vs.
THE TEXAS PACIFIC RAILWAY COMPANY.

CHRONOLOGICAL TABLE OF EVENTS.

1852, Feb. 16....Texas Western R. R. incorporated.

1853, Feb. 7.....General act regulating Texas railroads.

1856, Aug. 16....Name of T. W. R. R. changed by Texas legislature to that of the Southern Pacific Railroad Company.

1857, Dec. 19....Act of incorporation of the above amended.

1859, April 6.....J. M. Saunders et al. judgment v. the Sou'hern Pacific Railroad Company, $309\frac{05}{100}$, pp. 282, 329.

1859, Sept. 6.....Sale of the road to R. V. Richardson, pp. 833—'34.

1859, Oct. 3.....S. P. R. R. Co. made by-laws empowering board to sell or mortgage all its property, and empowering president and secretary to mortgage, vid. pp. 41, 837—846 et seq.

1859, Oct. 5.....Meeting of stockholders S. P. R. R. Co. and adoption of resolution authorizing mortgages, p. 846.

1859, Oct. 5.....Meeting of directors S. P. R. R. Co. directing execution of mortgage and issue of bonds, p. 846.

1860, May 1.....Before this date S. P. R. R. Co. became entitled to 256,000 acres of land in Texas. Unsold in August 1861, pp. 98, 101.

1860, June.....Bonds printed and ready for issue.

1860, Aug. 6.....V. K. Stevenson elected president S. P. R. R., 853–856.

Prior to
1860, Aug. 25....S. P. Railroad became entitled to 256,000 acres of land in Texas, and soon thereafter to 128,000 more.

1860, Aug. 25....Trust deeds of S. P. R. R. to V. K. Stevenson and R. V. Richardson, pp. 29, 41.

1860, Sept. 1.....Issue of 350 construction bonds, p. 644.

1860, Oct. 16.....V. K. Stevenson obtained loan of $30,000, p. 47, 3 notes $10,000 each; security, $48,000 bonds.

1861, March 1....Mortgage and Trust Deeds of Aug. 25, 1860, recorded, p. 41.

1861, April 16....Three $10,000 notes protested, p. 47.

1861, June.....$100,000 construction bonds delivered to V. K. Stevenson.

1861, Sept. 3.....Sale of S. P. R. R. to Fulkerson, $7,500. J. S. Holman became president.

1861, Sept. 6.....Road reorganized, p. 85.

1861, Oct. 1.....Circular of Holman, president, to stockholders, p. 596.

1866, April.....Three $10,000 notes lost by Adams Express Co., pp. 51, 647.

1866, May 17....R. B. Hall, *et al.*, loaned $100,000 (alleged $150,000) to S. P. R. R. Co., pp. 281, 302, 342.

1868, April 4.....Sale of Shreveport Road, leased by S. P., pp. 297, 831.

1868, May 5.....Sale of S. P. R. R. by sheriff to R. B. Hall, $2,150, pp. 87, 307, 401. R. B. Hall became president and reorganized, pp. 292, 313.

1868, Oct. 6.....Mortgage of May 17, 1866, foreclosed, and S. P. R. R. sold to R. B. Hall, $10,000, pp. 93, 300, 426.

1870.....Marshal O. Roberts bought $550,000 stock, new.

1871, March 3....U. S. Congress incorporated Texas Pacific, with power to consolidate with other roads, and mandate to assume their liabilities.

1871, May 24....Texas legislature donates $300,000 State bonds to S. P. R. R., which passes to T. P. road if it consolidates.

1871, Sept. 6.....S. P. R. R. Co. brought suit to annul V. K. Stevenson's construction bonds and mortgages, (by advertisement), p. 446.

1871, Dec. 2.....Act of May 24, 1871, amended.

1872, March 14..Decree annulling bonds and mortgages, p. 180.

1872, March 21..Texas & Pacific bought S. P. R. R. for $3,000,000, Thos. Scott signing as president for both, p. 28.

1872, May 2.....Name of T. P. Road changed to Texas & Pacific Railway Co.

1872, Nov. 19....Deed of March 21, 1872, recorded.

1873, April 12....V. K. Stevenson's written demand for possession of T. & P. Ry. Co. (refused), p. 45.

1873, April 16....V. K. Stevenson's original bill filed, p. 3.

1873, Sept. 3.....Answer, p. 61.

1874, April 3.....Amended bill filed, p. 146. (48 bonds.)

1874, Dec. 28....District Court of Harrison County reversed decree annulling bonds, pp. 180, 445.

1874, Sept. 16....Answer to amended bill, p. 156.

1876, Feb. 22....Second amended bill filed, p. 184.

1876, Feb. 22....Answer to above, p. 202.

HOLBROOKS' STEAM PRINTERY, 11 Mechanic St, Newark, N. J.

STATEMENT OF THE CASE.

The object of the suit is to recover from the Texas and Pacific Railway Company the amount due on interest warrants or coupons on 100 construction bonds of the Southern Pacific Railway Company, for $1,000 each, from January 1, 1861—the principal of the bonds being payable January 1, 1881—held by V. K. Stevenson.

Also, $30,000, with interest from April 15, 1861, paid by V. K. Stevenson to Schuchardt and Gebhard, for the use of The Southern Pacific Railway Company, and secured by a pledge of forty-eight of the same construction bonds.

Also, to recover the following construction bonds held by other parties, who have made themselves parties to the bill, and claim the same relief sought by the complainant, Stevenson, viz:

William H. Smith	thirty bonds,
J. D. Arundel	two bonds,
James Gillum	one bond,
George F. Flournoy	twelve bonds,
R. W. Hymen	ten bonds,

making fifty-five bonds.

The relief claimed is a decree for the payment of the matured coupons on the 100 bonds held by Stevenson and the 55 bonds held by the other parties, and that the principal be declared to be the first lien upon the road and its franchises and property acquired and now held by the Texas Pacific Railway Company.

And a decree for the payment of the debt of $30,000, with interest, and that the 48 bonds pledged as security may also be declared valid and a first lien on the road, and applied to the satisfaction of said debt.

The relief as to the other claims of the complainant, Stevenson, for services and advances not secured by a specific pledge of bonds, will not be insisted on, by me in this brief – it being discussed by Mr. Arundel.

The substantial question, therefore, will be the validity of the said construction bonds and the mortgage given to secure them and their effect in the hands of the present holders, as liens upon the road, franchise and property of The Texas and Pacific Railway Company.

History of the corporation prior to the execution of the mortgage.

The legislature of Texas, by an act entitled "An act to incorporate the Vicksburg and El Paso Railroad Company, passed Feb. 16, 1852, enacted that Rufus Doane and others should be a body corporate under the name of The Texas Western Railroad Company, with power to construct a railroad from a suitable point on the eastern boundary to El Paso on the Rio Grande. (Sess. Laws 1852, p. 197.)

By an Act passed August 16, 1856, (Sess. Laws, p. 76,) the caption and first section were amended so as to change the name of the company to The Southern Pacific Railroad Company, with the same powers, and to make all the acts of The Vicksburg and El Paso Railroad Company under the former act, valid and binding.

Prior to September, 1859, the company had completed 25 miles of road west from Marshall, and were entitled to a state grant of 256,000 acres of land, but had been unable to complete any eastern connection, and had fallen into the financial difficulties incident to the time, and on September 6, 1859, was sold under execution to R. V. Richardson. (Reorganization Agreement, Sept., 1859. Record p. 833.)

By the 5th section of the Act of December 19, 1857, amending the Act to regulate railroad companies (Paschal's Digest, 4,912,) it was provided that a sale of a railroad under execution, etc., should entitle the purchasers to all the powers, franchises and privileges of the corporation under its charter, or by virtue of general laws, and vest in them the power to construct, complete and equip the road, on the same terms and conditions imposed on the original corporators. (See section cited in 11 Wall, 475.)

Under this law, Richardson, the purchaser, reorganized the company with a nominal capital stock of seventy millions of dollars, divided into 700,000 shares, but actually of three and a half millions, the shares being sold at five dollars each.

Under this reorganization, which secured the just claims of the old creditors and stockholders, shares were subscribed as follows:

Jeptha Fowlkes	100,000
R. V. Richardson	59,017
R. W. Loughery	2,000
John Gregg	2,000
Z. P. Goodman	2,000
J. Edgar Thomson	5
W. T. Scott	5
Jason Wilson	5
J. C. Robinson	5
I. B. Edwards	1,000
	166,037

Thus almost the entire stock issued was held by Fowlkes and Richardson, who were the actual owners of the road, having been most largely interested in it before its reorganization, and earnestly devoted to its completion (Record p. 833–837.) And Richardson and Fowlkes, on the 28th of September, 1859, entered into an agreement for the reorganization of the company and adjusting the debts of the old corporation and the rights of the former stockholders. (Record, 835.)

The charter of the company provided (section 1) that it should have power to *grant* and receive and generally to do and perform all such acts and things as may be necessary or proper for or incident to the fulfilment of its obligations or the maintenance of its rights under the act. and consistent with the constitution of the state.

And section 5 provided that the immediate government and direction of its affairs should be vested in a board of not less than six directors, who should elect one of their own number president; that no person should be eligible as director, unless an owner or subscriber of at least five shares; that the board should have power to fill any vacancy that might occur in the board from non-election, death or otherwise; that "a majority of the board of directors shall have the authority of a full board, and all conveyances and contracts in writing executed by the president, and countersigned by the secretary, or any other officer or person authorized by the directors, under the seal of the company, and in pursuance of a vote of said directors, shall be valid and binding."

Section 17 provided that "the first meetings of the commissioners or directors appointed by this act shall be held at Marshall, in Harrison county, on the first Monday in July next, in which and all subsequent meetings *which may be held at such times and places as the directors may think best, said directors may act in person or by proxy.*"

By the general law in force at that time (Paschal's Dig., 4,911), it was provided that—

"It shall require a vote of a majority of not less than two-thirds of the stockholders of the company to establish such by-laws, and no company shall have the power to make any trust deed or mortgage on the franchise or property of the company, unless the power is expressly given by the by-laws of the company."

Acting under the authority of the charter and in pursuance of this general provision, the purchasers and their associates immediately took measures to provide funds to carry on the work by completing the eastern connection and extending the road westwardly.

The stockholders under the purchase of Richardson met October 3, 1859, at Marshall, Texas, and effected their organization and passed a careful system of by-laws. These by-laws provided, among other things—

That there should be seven directors.

That the officers should be a president, vice-president, secre-

tary, treasurer and directors, and such other officers as the board might establish.

That the *vice-president*, secretary, treasurer and a majority of the directors should reside in Texas.

That in voting for directors, or on any subject, each stockholder, in person or by proxy, should cast one vote for each share of his stock.

That a vacancy occurring in the board by death, resignation or otherwise might be filled by the board.

That the board should have power to appoint such additional agents, officers and committees as they might deem best for the transaction of the business of the company, and to prescribe their powers and duties.

That the trustees (Article 14), should have the power to make any trust deed or mortgage on the franchise or property of the company for the purpose of borrowing money to construct the works upon the recommendation in writing of the president and finance committee.

That the executive committee should be invested with all the powers and authority of the board of directors during the intervals of their meetings. (Article 38.)

That the salaries of all the officers should be fixed by the board.

(See Record, 837.)

Upon the adoption of these by-laws an election of directors was held, and the following were chosen:

J. Edgar Thomson,
W. T. Scott,
J. C. Robinson.
R. W. Loughery,
R. V. Richardson,
Jeptha Fowlks,
Jason C. Wilson.

The agreement between Richardson and Fowlks was ratified, and the meeting adjourned—the machinery of the new organization having been thus put in full operation.

On the same day, October 3, 1859, at Marshall, a meeting of the directors was held, at which Fowlks, Richardson, Scott and Loughery were present, and the following officers were elected:

Jeptha Fowlks, President.
W. T. Scott, Vice-President.
D. C. Wilder, Secretary and Treasurer.
E. A. Blanch, Chief Engineer.
Sam. Tate, Surveyor-General of the Land Department.
C. E. Hynson, Gen. Superintendent.

J. Edgar Thomson was elected president alternate (in pursuance of article 15 of the by-laws), to take the place of Fowlks upon his resignation.

Minute provisions were made by resolution to carry out the purposes of the company.

The president was directed to repair and finish as soon as possible the road from Swanston's Landing to Marshall, which was urgent, in order to form an eastern connection through the Red river.

And the president was empowered to sell, pledge or mortgage any of the property of the company for the purpose of effecting and meeting existing arrangements, buy and pay for iron, etc.

And he was also directed to cause contracts to be let as soon as practicable for constructing twenty-five miles of road, beginning at Marshall and extending west.

He was also empowed to pledge the state loan to meet the requirements of the company.

His salary was fixed at $10,000.

Gov. James C. Jones and Dr. J. Fowlks (after J. Edgar Thomson should accept the presidency) were appointed general agents of the company to sell stock, procure legislation and do all duties enjoined on them jointly or separately by the president, the board, or the executive committee.

It was early in contemplation to issue construction bonds secured by a first mortgage, and two days after the organization—October 5, 1859—as appears by the minutes (Record, 846) a meeting of stockholders was held, at which more than two-thirds of the stock was represented, and the following resolution was passed:

"Be it resolved, and it is hereby enacted, by the stockholders of the Southern Pacific Railroad Company, a majority of not less than two-thirds of the stock of the company herein concurring, that the board of directors shall have the power and authority to execute mortgages, deeds of trust, and deeds of conveyance, in bargain and sale, of and upon the franchise, chartered rights and charter, and the real and personal property now owned, equitably or legally, or hereafter to be acquired, and all appurtenances and hereditaments thereunto belonging; all choses in action, the railroad and rolling stock, now or hereafter acquired, of this company,

either in whole or in part, for the purpose of raising, obtaining or negotiating, or borrowing means or money to construct and aid in constructing our various works under the provisions of our charter, and the proper and usual operation of our railroad, the paying of freights, the paying of interest on construction bonds, or the paying of other liabilities and accruing interest, now or hereafter existing or created. And said mortgages, deeds of trust, and deeds of conveyance, shall be recorded in the minutes of the board, and thereby become part and parcel of the resolutions of the board so authorizing the same.

"J. FOWLKS, *Chairman.*"

It also appears by the minutes that on the same day a meeting of directors was held, at which Fowlks, Richardson, Loughery and Scott were present in person and J. C. Wilson by proxy, at which the following resolution was passed:

"Be it resolved, and it is hereby enacted, by the board of directors of the Southern Pacific Railroad Company, that the president is hereby authorized and empowered to execute, at any place in the United States, under the seal of the company countersigned by the secretary, a mortgage or deed of trust upon six millions of acres of the land of the company, donated by the state of Texas, and upon the entire line of the railroad of the company, commencing at the eastern line of the state of Texas, thence extending through the said state to the Rio Grande River, near the town of El Paso; also upon the rolling stock, stations, depot grounds and buildings, the franchises and chartered rights of the company, to secure certainly the prompt payment of twenty-five millions of dollars of construction bonds, issuable from time to time as ordered by the board of directors, and payable on the first day of January, A. D. 1885, in the city of New York, bearing interest at the rate of seven per centum per annum, payable on the first day of January and July of each year, represented by interest warrants or coupons, executed as aforesaid and appended to each bond.

"J. FOWLKS, *President.*"

Note.—It is contended that these minutes of meetings, Octoher 5, 1859, are untrue, and were fraudulently interpolated in the minutes, and that no such meetings were held.

Loughery, one of the directors, swears that he does not remember any such proceedings. (Record, 279.)

And Scott, another, says (Record, 244–5) that he does not recollect being present, but may have been; that the resolutions may have been passed when he was present, but he does not think they were.

Fowlkes and Richardson, who acted personally under the resolutions and ratified them in every form, are both dead.

They owned more than two-thirds of the stock—in fact, 159,017 shares, or nearly all of it.

Scott and Loughery owned 2,005 shares.

On the 8th of October, 1859, a meeting of the directors was held—the same parties being present. (Record, 851.)

Various business matters were acted on, and the president was authorized to establish branch offices in New York, Philadelphia, or elsewhere. He was empowered to make a suitable agreement with J. Edgar Thomson for his salary, when he should accept the presidency.

The next meeting was held November 24, 1859, when Fowlks was appointed general agent, with full and plenary powers to sell stock, attend to legislation, and arrange generally all the general agents of the company.

Mr. Thomson accepted the presidency in January, 1860, at a salary of $10,000, but very soon gave great dissatisfaction to Fowlks, who had the general management of the affairs of the company, and had in August, 1859, employed the complainant, Mr. Stevenson, to assist him with his great experience and influence in railroad matters. (Record, 536.)

The situation of affairs during this first year may be readily gathered from a series of fourteen letters, written by Fowlks to Stevenson, beginning on page 653 of the record.

They show the difficulties encountered—the disappointment in President Thomson—the entire reliance of Fowlks on Mr. Stevenson—the efforts to secure favorable legislation in Congress to enhance the value of the stock—the struggles with the difficulties in prosecuting the work—the endeavor to sell stock to raise money—the direction to Mr. Stevenson to buy material, to be paid for in construction bonds (not yet issued) —the intention to give contracts for 50 miles of road, payable in notes at 10 per cent. on construction bonds, (see letter of June 16, 1860, p. 657,) and the determination to relieve Mr. Thomson and put Mr. Stevenson in his place, as the only hope of success.

No other meeting of the directors is shown in the record until August 6, 1860.

The affairs of the company had been in the meantime wholly managed by Mr. Fowlks, the largest stockholder, under Mr. Thomson as president.

No action had been taken under the resolutions authorizing the issue of bonds, the desire of those interested evidently being to finish as much as possible before mortgaging the road, in order to secure the state aid provided by law.

But that such issue was in contemplation is clear from the letter of Fowlks to Stevenson, June 16, 1860, and the contracts hereafter referred to.

At the meeting of August 6, 1860, a contract for fifty miles of road, made June 23, 1860, between J. Edgar Thomson, president, and DeGraff and Smith, was ratified.

Also a contract for rails, made March 1, 1860, between Fowlks aud The American Railway Bureau.

And a form of mortgage or trust deed was submitted to the board and ratified.

The action of Mr. Fowlks, in calling on the president, Mr. Thomson, for his resignation, was approved.

The resignation was accepted, and the complainant, Mr. Stevenson, was appointed in his place.

Mr. Fowlks was appointed general and financial agent, with the powers of president, until Mr. Stevenson could reside in Texas, and he was given full charge and control of the management of the financial affairs and assets of the company, and the president was requested to cooperate with him in executing any obligation deemed necessary by Mr. Fowlks to provide means to advance the work.

Stevenson, Tate, Richardson, McDermott and Fowlks were appointed an executive committee with full authority over all the finances, lands, property and franchises of the company, any three of whom should be a quorum; Stevenson, Richardson and Fowlks formed a quorum of this committee. Directions were given as to the form and terms of the mortgage, and the executive committee were authorized to amend the financial policy adopted, and change the mortgage presented, at their discretion so as to raise without fail the one million of dollars, or as much as was necessary to protect the company, and especially to progress vigorously with the contract of DeGraff & Smith.

It was provided that the executive committee might vacate and fill all offices at discretion to be held until otherwise directed by the board.

V. K. Stevenson, D. S. Jennings, J. S. Holman and Charles McDermott were elected directors.

The third and fourth resolutions passed at this meeting are as follows:

"Resolved, third, that the form of the mortgage or trust deed herewith submitted to the board by Dr. J. Fowlks, be and is hereby approved, and this board hereby authorize and empower the said Fowlks and V. K. Stevenson to select proper and suitable persons for trustees, and have the said mortgage or deed of trust duly executed by them and by the company's president or vice-president and secretary, and have the same legally recorded in this state and elsewhere, as required by law or usage in such cases. The executive committee is authorized and empowered to modify, amend, and alter the mortgage before recording same at discretion.

"Resolved, fourth, that one million of dollars of the bonds are hereby authorized to be issued under said mortgage, and the same to be made convertible into the stock of the company, for a period of two years from the date of the issue, and if not so converted by the holder, each bond of one thousand dollars shall be entitled to such a bonus of land upon its surrender and payment by the company. But it is expressly ordered and directed that the million of bonds so ordered to be issued shall not be sold to exceed $26,000 per mile of road, nor hypothecated in whole or in part, for a sum which shall exceed said sum, $26,000 per mile, strictly preserving the good faith and rigid observance of the restrictions and limitations of the said mortgage or trust deed."

The minutes of this important meeting are found on page 853 of the record.

This brings the history of the company down to the execution of the mortgage and the issuing of the construction bonds, August 25, 1860.

The execution of the mortgages and issue of bonds.

The policy of issuing bonds secured by mortgage having been determined on in October, 1859, its consummation was delayed for various causes until the next year.

But the intention to do so is manifest from Fowlks' letters (p. 658) and from the arrangements made with contractors.

In fact the bonds were prepared and printed in New Orleans in June, 1860, and were ready to be issued (p. 547.)

But it was then plainly the intention of Fowlks, the general manager, to cause President Thompson's resignation, and have Stevenson elected before issuing the bonds.

After the election, August 6, 1860, in his absence, the mortgages were prepared, bearing date August 25, 1860, and afterwards executed by him and the secretary D. C. Wilder in New York, and acknowledged September 10 and proved Sept. 12, 1860, before a Texas commissioner (Exhibit B, p. 29.)

Both mortgages were made by the Southern Pacific Railroad Company to R. V. Richardson and Vernon K. Stevenson, trustees.

Both recite the stockholders' resolution of Oct. 5, 1859 and the directors' resolution of the same date.

One recites that for the purpose of raising funds for the construuction and completion of the road, for purchase of iron and other materials, for expense of maintenance, and for compensation of officers and agents, trustees, engineers and other necessary assistance, the company proposed to issue twenty-five millions in bonds, payable January 1, 1883, with seven per cent. interest, half yearly, and conveys to secure the bonds the railway stations and depots of the railroad from the eastern to the western boundary of Texas, and all stations, depot buildings, engine houses and other improvements and constructions thereon then made or thereafter to be made, subject to the prior lien of the state to secure a loan of $6,000 per mile, under the act of August 13, 1856, and to any lien to be created by the United States, the bonds to be issued only at the rate of 26,000 per mile, with minute provisions as to the mode of issuing, and the nature and limitations of the trust.

The mortgage also conveys six millions of acres of land secured to the

company by the laws of the state, and provides for the mode and rates of disposing of the same.

And it carefully provides for the disposition of the income of the road to pay current charges, interest on the bonds, etc., and that on default in the payment of interest the trustees may take possession of the *railroad* and all the property intended to be conveyed, and all engines, etc. appertaining to the railroad as if actually included in the mortgage, and apply the income to the payment of interest, etc.

The other mortgage conveys one million of acres of land granted by the state of Texas, to be designated by the company, and held by the trustees, free from all encumbrance for the purpose of sale from time to time to raise funds for the payment of interest on the construction bonds in case of deficiency from other sources. It is called the interest mortgage.

The execution of the mortgages is proved by Mr. Stevenson—Mr. Wilder being dead—and he delivered them to the secretary to be recorded.

The recording was delayed during Mr. Stevenson's absence in Europe where he went soon after the execution.

They were recorded in Harrison county, Texas, March 1, 1860. (P. 44.)

350 bonds issued.

These bonds were taken to New York by the secretary, having been engraved in New Orleans under Mr. Thomson's presidency, and were dated September 1, 1860.

They were executed by the president in New York, under the seal of the company, and countersigned by the trustees (Record, p. 547). Hynson, the superintendent, swears that he saw Wilder, the secretary, sign some at Marshall (Record, p. 214). When executed they were all delivered to the secretary, who delivered them to Mr. Fowlks, the general financial agent of the company (p. 547).

Two agreements were made between the company and Bellot des Minieres Brothers & Co., French contractors, dated September 11, 1860, and proved September 12, at the same time as the proof of the mortgages and before the same commissioner.

One contract was for the building of the road, and the other for the managing its banking business and for the disposition of its construction bonds, in payment for construction.

The second agreement (Ex. T., p. 633,) recites the arrangements "now being made for issuing construction mortgage bonds," and the nature and extent of the lien of the mortgage, and provides for raising twelve hun-

dred thousand dollars in cash on the bonds, and placing it to the credit of the company.

Both of these contracts were subject to ratification by the firm in Paris.

Mr. Stevenson then went to Paris to secure the ratification, and remained till February, 1861, when all efforts were rendered useless by the impending war, and he returned, having kept Mr. Fowlks, the general agent, advised of all his proceedings.

While in London, November 2, 1860, Mr. Stevenson made a purchase of rails for Geo. Peabody & Co., to be paid one-half in U. S. bonds and one-half in first mortgage bonds of the company at par.

Ex. W., pp. 640–642.

The contract was canceled December 8, in consequence of the threatening state of the country, and Mr. Stevenson succeeded in getting 1,000 tons sent to New Orleans to himself individually, February 5, 1861, (p. 642), the contract to be forfeited in thirty days if it should be found unsafe to deliver to the company.

This contract refers also to the construction bonds, to be taken at par for half the bill.

The iron was not taken, and remained the property of Peabody & Co., at New Orleans.

These contracts are referred to in order to show the publicity and good faith of the mortgages and the issue of bonds.

All the plans of the company and all the efforts of the president and the general agent were frustrated by the war.

Every effort was made to keep up the DeGraff & Smith contract, and to raise money to complete fifty miles, but the war cut off communication, and disturbed all operations.

Bonds actually disposed of.

1. To complainants not interested in the road.

2. To the president, Stevenson.

Those held by outside parties are:

Wm. H. Smith	30
J. D. Arundel	2
James Gillum	1
Geo. F. Flournoy	12
R. H. Hymen	10
	55

Smith was one of the contractors—DeGraff & Smith.

Their contract was made June 23, 1860. It was for the building of fifty miles of road to be paid for in notes, United States indemnity bonds and first mortgage construction bonds. (Record, pp. 479, 939.)

Smith states that the president—Thompson—and Fowlks, the financial agent, told him that they were about to issue seven per cent. construction bonds secured by first mortgage, and were to raise money for the first twenty-five miles and pay for the second twenty-five in construction bonds or cash if they got money aid from Congress.

They began work in July, 1860, and continued till interrupted by the difficulties arising out of the election of President Lincoln.

They were paid $9,000 by President Stevenson, and, in the latter part of November, demanded money for work done from Mr. Fowlks, general financial agent.

He then had the bonds delivered to him for this purpose.

He paid W. H. Smith on account ten of these bonds—10,000—and took his receipt, saying that he was going north to raise money. (Record, 481, 551.)

After much pressure and negotiation through the winter, James D. Holman, the vice-president, in May, 1861, gave Smith $20,000 of the bonds to raise money on for work done. (Record, 482, 551.)

Not being able to dispose of them he credited them at par on the contract. (Record, 486.)

The contract price of the work actually done was $325,000.

They received $9,000 in cash from Stevenson, $20,000 in goods at different times, $30,000 in bonds, as stated, and, upon a forced settlement after the sale of the road as hereafter stated, $10,000 in United States bonds and cash, 5,000 stock and 21 sections of land, making in all $80,720, leaving a loss of $240,280 on their work.

Thus Wm. H. Smith holds as a bona fide purchaser, at grievous sacrifice, thirty of these bonds, with interest due from January 1, 1861, except upon ten of the bonds from which one coupon was cut off.

J. D. ARUNDEL bought two of the bonds from Brandon West in Burleson county, Texas, January, 1872, for $1,200 cash in the usual course of trade, believing them to be good, and with no knowledge except what they afforded on their face. They are numbered 29 and 45. (Record, 173, 692.)

Arundel, therefore, is a bona fide holder of two bonds, bearing full interest.

James Gillum holds one bond, No. 22. (Record, 174.)

George F. Flournoy holds twelve bonds, numbered 29, 45, 23, 24, 25, 28, 30, 27, 301, 31, 46, *22*. (Record, p. 176.)

R. H. Hyman holds ten of the bonds, numbered 203 to 211 inclusive. (Record, 873.)

Mr. Stevenson states that twenty-five bonds were disposed of at New Orleans for money by Fowlks and other members of the executive committee. These are probably the bonds held by the three persons last named.

Bonds held by Mr. Stevenson:

These are in two classes:

1. 48 bonds pledged to secure the payment of three notes of $10,000 each, discounted by Schuchardt & Gebhardt in New York for the use of the S. P. R. R. Co.

2. 100 bonds given to Mr. Stevenson for moneys due and to become due to him from the company.

As to the 48 bonds, the transaction was briefly this:

In October, 1860, shortly before Stevenson went to Paris, it was necessary to raise money to pay urgent claims of the contractors, and to provide for other expenses.

Three notes were made by the company—Stevenson signing as president—to the order of Dr. Fowlks—dated Oct. 15, 1860.

They were endorsed first by Fowlks, next by Stevenson, and then by J. T. Soutter, of New York.

Soutter had an account with Schuchardt & Gebhardt, and got the notes discounted by them, and gave the proceeds to Dr. Fowlks, the financial agent of the company.

Out of this money, $9,000 was paid to Smith on his contract, as above stated, and all was applied to the use of the company. (Record, 560.)

These notes were not paid by the company; Schuchardt & Gebhardt failed, and in 1866 they were paid to the estate by Mr. Stevenson, in the manner detailed in his testimony (p. 556), he giving full value for them in railroad bonds and mortgages on real estate.

The notes were delivered by him and afterwards lost by Adams Express Company *in transitu* to attorneys in Memphis, sent January 24, 1866. (Record, 559, 647, 650.)

To secure this debt, so paid ultimately by Mr. Stevenson, Dr. Fowlks, with the approval of the executive committee—a quorum being in New York—gave 48 construction bonds to Mr. Stevenson at the time of his endorsement, Oct. 15, 1860.

The notes could not be discounted without his endorsement.

He endorsed—received the bonds as security from the executive committee through the financial agent—paid the notes after maturity—has

never been reimbursed—and now holds the bonds, with interest unpaid, to secure this debt of $30,000, with interest at 7 per cent. from the maturity of the notes, April 15, 1862.

He is, therefore, in every sense a bona fide holder for the amount of $30,000 and interest, of these bonds, unless they can be invalidated for some fraud or irregularity for which he is directly responsible.

As to the 100 bonds.

These were given to Mr. Stevenson in June, 1861, by Dr. Fowlks, for the executive committee, after much negotiation, in payment for moneys then due to him and to become due, under the circumstances detailed by Mr. Stevenson. (Pages 551–554.)

The substance of it is, that he had been employed as agent of the road in its most important and critical matters in August, 1859, at a salary of $30,000 per year; and then in August, 1860, as president at the same salary.

He had been long engaged in administering railroad affairs with great success, and his services were estimated accordingly.

They owed him $55,000 in June, 1861, and had only paid him $6,000.

They urged him to accept $100,000 in bonds for two-thirds of past due salary, and for the same proportion of future salary, leaving only $10,000 to be paid in cash annually.

In fact no more cash was ever paid to him than the $6,000, and the company owed him in cash for salary at $10,000 to April, 1862, and for expenses, $46,538.58, besides the two-thirds of the salary paid in the bonds.

And in addition to this he advanced $10,000 for supplies sent to New Orleans, which he omitted from his account.

See account—Record, p. 52.

Test. of Hynson, sup't—Record, p. 214.

Thus the actual amount due to him for services, expenses and advances for the company, reached very nearly the amount of the bonds at par, without including the two-thirds of future salary not embraced in his account.

It is therefore claimed that, holding him bound by the strictest equitable principles applied to trustees dealing with the corporation to which they owe their duty, he is the bona fide holder of these bonds, to the extent of the actual indebtedness of the company to him, to be examined and determined by the master.

The arrangement with Mr. Stevenson which resulted in his payment in bonds instead of cash for services and outlays which the war rendered comparatively ineffectual, took place in June, 1861.

By this time the war had disorganized everything, and frustrated all plans.

Of course, the enterprise languished, and it became impossible to sell bonds to raise money or to fulfil contracts.

The efforts of Mr. Stevenson, so nearly completed, to obtain contracts in France and England, were necessarily rendered useless.

All that remained was to meet existing obligations in good faith and wait for peace.

The company had twenty-five miles of completed road and 256,000 acres of land already vested.

Its obligations outside of DeGraff & Smith, the contractors, and the few holders of bonds already issued, were of small amount, not exceeding $10,000.

But they were enough to furnish the machinery by which a few parties in Texas, with little pecuniary interest in the road, but with the power over it furnished by their position as directors and agents, and by their presence on the spot, could go through the forms of transferring the entire property to themselves and cutting off all northern parties in interest, and all creditors not involved in their scheme.

These plans were speedily accomplished.

Sales of the Road.

There were four judicial sales.

1. September 3, 1861, to H. S. Fulkerson, made by the sheriff of Harrison county, Texas, who sold the whole property and franchises of the road as an entire thing (under the provisions of the law then existing, Pas. Dig., 4911,) under the following judgments and executions against the S. P. R. R. Co.:

1. J. M. Saunders, April 6, 1859, for $300.09, and costs, $74.00; in all, $374.09. Upon which was credited before sale, $277, leaving a balance of $97.09. Execution was levied on this judgment August 9, 1860.

2. Henry Wickland, Sept. 26, 1860, $3,500 and costs. Execution issued and levied July 11, 1861.

3. Amelia Swanson, Oct. 27, 1860, $2,480.50 and costs. Execution issued Nov. 22, 1860—levied Jan. 3, 1861.

4. J. B. Williamson, Oct. 23, 1860, $1,000 and costs. Execution issued Nov. 23, 1860—levied January 3, 1861.

The purchase money was $7,500, just enough to satisfy the judgments. Fulkerson, 4 days after this sale, conveyed the entire property to a new

organization, effected in view of the sale—with J. S. Holman, the late vice-president, as its president, and the new company took, or rather kept possession and continued to operate the road.

A circular was issued Oct. 1, 1861, announcing the sale—offering opportunities to former stockholders—but declaring the fixed policy of never admitting northern stock—and asserting the property to be worth a million of dollars. (Record, 596.)

Second sale.—April 4, 1868.

This was a sale of the lease of the Vicksburg, Shreveport and Texas Railroad to the Southern Pacific Railroad Company. The leased road was in Louisiana, and was acquired by the Southern Pacific Railroad Company in order to furnish an eastern outlet.

The sale was made under judgment confessed by the Southern Pacific Railroad Company, by a resolution of the company (Record, 865,) passed December 18, 1867, waiving all stay of execution, in the District Court of Caddo Parish, Louisiana.

It was made by the sheriff of Caddo Parish to B. M. Johnson and included the lease and certain rolling stock which was bid off by Johnson by mutual agreement among the parties in interest for $152,066.66. (Exhibit G, Record, 297-8.)

Third sale.—May 5, 1868, by the sheriff of Harrison county, to Robert B. Hall. This was a sale of the road as an entire thing (although the law authorizing such a sale had been abrogated by the constitution of 1866) under sundry judgments and executions against the company for $2,150. (R. 89 to Ex. D.)

Hall on the same day made a deed to his associates, whom he named as directors of a new company, (R 313,) who effected their organization May 9, 1868, (R. 292,) but the agreement under which the sale was made was in fact completed April 4, 1868 (see recital in the deed of Hall, R. 313.)

Fourth sale.—October 6, 1868. This sale was made under the foreclosure of a mortgage dated May 17, 1866 for $150,000, given to Hall, Garvin and others, on which a suit for foreclosure was brought.

The sale was made by the sheriff of Harrison county to Robert B. Hall for the benefit of himself and others named on the deed for $10,000, (see Exhibit E, R. 93.)

It is contended on the part of the complainants that, as against the mortgage of August 25, 1860, securing their bonds, all of these sales are void and of no effect, and that all titles acquired through them are subject to the lien of their mortgage to the extent of the bonds issued to and held by them.

Consolidation with Texas Pacific Railway Company.

March 3, 1871, the Congress of the United States incorporated the Texas Pacific Railway Company with power to purchase the stock, property and franchises and consolidate with any incorporated companies in the prescribed route—from Marshall to El Paso and thence to California.

And by a supplementary act passed May 2, 1872, changed its name to The Texas and Pacific Railway Company.

The legislature of Texas by an act which became a law May 25, 1871, made a donation of $3,000,000 of the bonds of the state to the S. P. R. R. Co. under certain conditions; and gave authority to that company, The Southern Transcontinental Railway Co. and The Texas Pacific Railway Co. to consolidate on terms to be agreed on.

Certain modifications were made by an act which became a law Dec. 2, 1871.

And by virtue of these acts the S. P. R. R. Co. and The Texas Pacific Railway Co., on the 21st of March, 1872, consolidated and became one company, and the S. P. R. R. Co. conveyed to the Texas Pacific all its franchises and property in Texas, Louisiana and elsewhere for the consideration of three millions of dollars, of the seven per cent. bonds of the latter company and the assumption of the floating debt of the former company, not exceeding $700,000, and the debt due to the state of Texas not exceeding $250,000.

At the time of this consolidation Thomas A. Scott was president of the Southern Pacific Railway Company, having been elected February 16, 1872, and he was also president of the Texas Pacific Railway Company.

Ex. A., Record, p. 28.

Test. of Thos. A. Scott, Record, p. 803.

By this consolidation and sale the Texas and Pacific Railway Company was vested with all the rights and privileges of the S. P. R. R. Co., and the corporate existence of the latter was merged in and is now represented by the former, but the charter of the latter was not forfeited, annulled or surrendered, but continued to exist in the manner stipulated by the terms of the consolidation, by the corporate organization and name of the Texas and Pacific Railway Company. (Record, p. 445.)

Suit to Annul Construction Bonds.

September 6, 1871, a suit was instituted (in evident preparation for the consolidation), by the S. P. R. R Co. against V. K. Stevenson and William B. Grubbs, in the District Court of Harrison county, to have the deeds of trust and construction bonds, on which this suit is founded, declared null and void.

Stevenson was cited by publication to appear, and on his failure to

appear, judgment by default was taken against him, March 14, 1872, while Thos. A. Scott was president.

This judgment by default was afterwards reversed by the Supreme Court, on the application of Stevenson, and the cause remanded to the District Court.

By agreement (Record, p. 180), the suit thus remanded is to remain without trial until the close of this suit, and to abide its result.

It will be observed that the sale to and consolidation with the Texas and Pacific Railroad Company took place March 21, 1872, but seven days after the decree by default, annulling the bonds; and that Thomas A. Scott, the president of the Texas and Pacific, being also president of the Southern Pacific Railroad Company, which brought that suit, had full knowledge of the existence of the bonds held by Stevenson and of the mortgages given to secure them.

The very object of the suit was to annul Stevenson's bonds and to extinguish the lien of the mortgages before the proposed transfer and consolidation, which were consummated within a week after the suit terminated, as, it was supposed, in a final decree annulling the mortgages.

Demand of V. K. Stevenson.

April 12, 1873, Mr. Stevenson, trustee, served on the Texas and Pacific Railway Company, at their office in Marshall, a formal demand, reciting the default of payment of interest on the bonds, and requiring possession of the property in order to execute the trust, which was refused.
Record, p. 45, &c.

The original bill in this suit was filed April 16, 1873.

Defences.

The defences set up in the answers and amended answers are, in substance:

1. That the mortgages, although executed and recorded as alleged, created no lien in favor of holders of bonds issued thereunder, constituted no notice to subsequent purchasers of the road and its franchises, and were and are void, because they were not authorized by the stockholders and directors as prescribed and directed by the by-laws of the company.

2. That the mortgages are void because Mr. Stevenson was never rightfully or legally elected president of the company, and consequently all his acts as such were void and of no effect.

3. That the company never issued any bonds as set forth in the bill, and never authorized their issue, or sold, delivered or received value therefor. And that if issued at all it was through the fraud of Stevenson and his confederates, and the company is not liable for the bonds or the coupons.

4. That Stevenson is not the owner and holder of the one hundred bonds for value or otherwise, and gave no consideration for the same, never having been engaged as president or entitled to any pay or salary for services or advances.

5. That Stevenson did not hold the forty-eight bonds as collateral for the notes discounted by Schuchardt & Gebhardt, and that the company did not receive the money raised on those notes, and Stevenson did not pay them as endorser, and the company is not liable to him therefor.

6. That Smith is not the bona fide holder of his thirty bonds, but settled with the company in full, including any bonds he then held.

7. That by virtue of the several judicial sales above-stated, the complainants and all creditors claiming under the mortgages of August 25, 1860, are cut off and forever barred.

8. That the Texas and Pacific Railway Company by reason of the several judicial sales, the judgment of the District Court annulling the bonds, the acts of Congress and the Legislature of Texas, and the sale and consolidation under said acts and the stipulations in the deed from the S. P. R. R. Co., is an innocent purchaser in good faith, and is not to be subjected to the complainants' claims.

9. That whatever may have been the complainants' causes of action they are all barred by lapse of time and laches, and by the principles of equitable estoppel.

The questions presented therefore are—

1. Are these mortgages executed and recorded as admitted in the answers valid and existing liens upon the property mortgaged, in the hands of the Texas and Pacific Railway Company, to secure bonds issued thereunder in the hands of bona fide holders for value?

2. Are the complainants, or any of them, such bona fide holders of any bonds issued under the mortgages?

If both of these questions shall be decided in the affirmative, the decree of the court below wholly dismissing the bill, must be reversed.

And then the question will remain, for this court, or for the court below, or the master adjusting the rights of bondholders, what bonds held by the complainants or others are valid in their hands, and secured by the mortgages, and the amounts due upon them respectively.

And on this inquiry will be determined the question of the validity of the bonds in the hands of Mr. Stevenson, the president, including the two separate classes, viz: 48 bonds held as collateral for money paid for the company by him as endorser of its notes, and 100 bonds received for his services and outlays as agent and afterwards as president; and the amount justly due to him, in view of his relation to the company, upon those bonds.

The Circuit Court dismissed the bill. (Record, p. 879.)

The opinion of Judge Duval, which is not found in the record, is as follows—after reciting briefly the bill and answers:

"From a careful examination and consideration of pleadings and proofs, it is my opinion that no authority existed for the execution of the bonds and mortgages; that the by-law claimed to have been passed by the stockholders, October 5, 1859, was not made at any meeting of the same, and that the resolutions claimed to have been passed at the same date by the directors was never in fact passed by them; that therefore there was a want of power and authority for executing the bonds and mortgages in question, and on this account they are null and void as not being the act of the company. It is further my opinion that what purports to be a resolution of the company endorsed on the bonds was never passed at any meeting of the stockholders or directors thereof, and is null and void as not being the act of the company.

"If I should be mistaken in my conclusion upon this subject as respects the mortgages, I do not think I can be as respects the bonds, admitting that the mortgages were binding on the company. I have looked in vain for any evidence showing that the company authorized the issuance of bonds excepting that which is contained in the resolution of the meeting of directors purporting to have been passed at the meeting of October 5, 1859, and which is alleged by the defendants to have been a fraudulent entry on the books. Supposing it to have been genuine, however, this resolution authorized the execution of a mortgage on 6 million acres of the land donated by the state of Texas, to secure among other things the payment of 25 million of construction bonds issued from time to time 'as ordered by the board of directors,' &c. So far as I have been able to discover from the evidence before me, no such resolution was ever passed by the board of directors as that authorizing the issue of 350 bonds as alleged in complainant's bill, or of any construction bonds whatever. It seems to me, therefore, that there must have been an utter want of power and authority on the part of those who issued the bonds and mortgages herein sued on. But apart from the want of power and authority on the part of those who issued the bonds and mortgages in question, the matter is to be received in reference to the charge of fraud as made by the defendants. In the case of Smith vs. Sac. Co., 11 Wall, 139, it was held that fraud in the origin or inception of negotiable bonds and coupons issued by a public corporation, will throw upon the holder the burden of showing that a valuable consideration was given for them before maturity.

"Here is a case in which inspection of book No. 2 will satisfy anyone as it seems to me that the entries made on pages 63 and 64 were made falsely and fraudulently. No matter by whom it was done, I think that an in-

spection of the book itself in connection with all the evidence in regard to the examination and issuance of the bonds will throw such a cloud of suspicion around them as to require of all the parties suing in this case to show that they paid a valuable consideration for the bonds and coupons sued on, and that they had no knowledge of any illegality attending their issue. This in my judgment has not been done by any of these complainants.

"I deem it unnecessary to say anything as to the judicial sales or of their legal effect on the complainant's case. Nor as to various objections to the testimony, all of which as to the execution of the bonds and mortgages has been considered, as also that which goes to sustain or discredit the charge of fraud.

"I may say, however, that so far as the defendants' objecting to the testimony of Martin Tully, J. W. Howard, and John Coleman, and the motion to suppress the depositions of H. McKay and Wm. Bradfield, they may be regarded as overruled; the same having been considered by me for what it was worth on the whole case as made by the record before me.

"I think there is no equity in the bills of the complainants, and that they ought to be dismissed with their costs; it is so ordered and adjudged. The clerk will enter a decree of dismissal here and send a certified copy to the clerk of U. S. Circuit Court at Tyler, with directions to enter the same upon the minutes there on the first day of the next November term, *nunc pro tunc*, as if the decree had been received at Tyler on the last day of the last April term thereof."

ASSIGNMENT OF ERRORS.

The complainants assign for error.

1. That the court erred in holding that no authority existed for the execution of the bonds and mortgages; that the by-law of October 5, 1859, and the resolutions of the directors of the same date were never made or passed, and that the bonds and mortgages were therefore null and void as not the act of the company.

2. That the court erred in holding that the resolution endorsed on the bonds was never passed at any meeting of the stockholders or directors and is null and void as not being the act of the company.

3. That the court erred in holding that their was no evidence showing that the company authorized the issuing of the bonds except the resolution

of October 5, 1859, and that if that resolution was genuine there was no evidence that any resolution was passed by the board of directors authorizing the issue of the bonds alleged in complainants' bill or any construction bonds whatever, and that they were therefore wholly without authority.

4. That the court erred in holding that from inspection of the book of minutes it was plain that the entries of October 5, 1859, were made falsely and fraudulently, and were so clouded with suspicion as to throw upon bondholders the burden of proving that they paid a valuable consideration.

5. That the court erred in holding that none of the complainants had proved that they did pay a valuable consideration for their bonds.

6. That the court erred in dismissing the bill, and in not holding that the mortgages set forth in the bill are valid and subsisting liens against the property described therein, as now held by the defendants, The Texas and Pacific Railway Company, and that the bonds held by the several complainants issued thereunder are valid, and that the property should be sold and disposed of to satisfy the amounts found to be due for the coupons due and the interest thereon.

BRIEF.

I.

The actual execution of the mortgages is not denied—but virtually admitted.

The answers admit that they are found on record, and only allege that their execution was unlawful.

But the actual signing and sealing is proved by the president himself—the secretary and Mr. Richardson, the other trustee, who signed them, being dead.

The actual signature and issuing of the bonds is also proved by Stevenson, C. E. Hynson and W. H. Smith. (Record 214, 215, 496, 497, 547 and 548.

II.

But it is alleged that they were executed and issued without lawful authority.

This defence is set up by the company itself—acting now through its successor company, vested with all its rights and subject to all its responsibilities.

Even if the mortgages could be shown to be *ultra vires*, no one can take advantage of the defect of power involved but the state. As to all other parties it must be held valid and may be enforced accordingly.

National Bank v. Matthews, 98 U. S. 621.
Jones v. Guaranty and Indemnity Co., 101 U. S. 628.

In the latter case a corporation had given a mortgage for future advances.

It was insisted that it could, under its charter, only mortgage its property to secure a debt incurred in its business and already subsisting.

The court say that this construction is too narrow. "At common law every corporation had as incident to its existence the power to acquire, hold and convey real estate, except so far as it was restrained by its charter or by act of Parliament. The *jus disponendi* was without limit or qualification. It extended to mortgages to secure the payment of debts."

Holding that there was nothing in the charter to forbid the company from making the mortgage to secure future advances, the court also holds that even if it had been *ultra vires* the company could not take advantage of it, and says:

"Where money had been obtained by a corporation upon it securities,

which were irregular and *ultra vires*, but the money was applied for the benefit of the company, with the knowledge and acquiescence of the shareholders, the company and the shareholders were estopped from denying the liability of the company to repay it. And the same result follows where such securities are issued with the knowledge of the shareholders, so far as the money thus raised is applied for the benefit of the company. A Court of Equity abhors forfeitures and will not lend its aid to enforce them. Nor will it give its aid in the assertion of a mere legal right contrary to the clear equity and justice of the case."

Therefore, if these mortgages were technically irregular, or were issued without specific statutory authority, yet if it appears that they were issued not only with the knowledge but by the definite personal action of Fowlks and Richardson, the holders of nearly all the stock, and of the president and secretary of the corporation, and that the few bonds issued were actually applied to the benefit of the company—for labor, services or otherwise—then the defendants are estopped from denying the validity of these securities in the hands of their *bona fide* holders.

III.

Even if there were in this case a total absence of statutory authority to execute mortgages and issue bonds, it would not be necessary to consider the question whether a railroad corporation can, without such authority, mortgage its franchise to be a corporation.

The mortgages in this case do not purport to convey the franchise. They cover the road, its buildings, structures and equipments, and the right to take possession on default and to collect the income and profits, and they also convey all lands acquired and to be acquired for the benefit of the company, and outside of its actual railway, and they provide for the sale of such lands on default, and the application of the proceeds to the debt.

In Galveston Railroad vs. Cowdrey, 11 Wall, 474, the court says:

"Without examining how far the operative effect of a mortgage executed by a railroad company on its road, works, and franchises may extend *per se* without statutory aid, it is sufficient to say that in our opinion the legislature of Texas has validated the mortgages."

It is evident that the court was not prepared to say that a mortgage in good faith upon the road and works, and even the franchise might not be sustained without any statutory aid whatever.

(See Jones on Railroad Mortgages, sec. 1–5.)

But land of a railroad company not acquired under the right of eminent domain, or so connected with the franchise as to disable the corporation from performing the public duties imposed on it, may be conveyed or mortgaged without special authority under the general right of corporations at common law to dispose of whatever property they have power to

acquire. As to property not acquired for the purposes of the road, the company stands in the relation of an ordinary trading corporation which has no public obligations.

Jones on R. R. Securities, sec. 12.
Hendee v. Pinkerton, 14 Allen, 381.
Minn. v. Pac. Railway, 92 U. S., 49.
Tucker v. Ferguson, 22 Wall, 572.

In this case the company had acquired at the date of the mortgage 266,000 acres of land from the state, which it held for the very purpose of being disposed of to carry on the work. And it was entitled to acquire millions of acres more as it advanced.

These lands were specifically pledged to secure the bonds issued. They were not necessary for the construction of the road. In fact, their only use was to be parted with for value for the use of the company.

Therefore even if the mortgage on the road itself and its works was without statutory authority, and could be held void for that reason as to the structure itself, yet it would operate as to these lands, as well as those acquired at its date, as those afterwards obtained.

In Hendee v. Pinkerton, *ub. sub.*, a railroad company had mortgaged certain lands held for storehouse purposes, and mortgaged them, as well as part of their track, to secure bonds.

The court said: "We entertain no doubt that the company could lawfully sell and convey the lands embraced in this bill. They were not acquired to enable the corporation to carry on the business which it was chartered to do for the benefit of the public, nor needed or used for that purpose. Their alienation in no wise impaired or affected the usefulness of the company as a railroad, or its ability to exercise any of its corporate franchises. In the absence of any express or implied legislative prohibition this corporation possessed all the ordinary rights of ownership over these lands and could convey them away absolutely or mortgage them to secure any valid indebtedness. The recent cases in which railroad mortgages have been adjudged invalid by this court do not countenance any doubt of the power of a railroad company to sell and convey whatever property it may hold not acquired under the delegated right of eminent domain, or so connected with the franchise that the alienation would tend to disable the corporation from performing the public duties imposed upon it in consideration of which its chartered privileges have been conferred."

In this case the lands had been acquired only by means of the services, advances and labor which these bonds were given to secure. They could only be acquired on completion of 25 miles of road.

It was wholly within the power of the company, and, in fact, incident to the nature of the transaction, that they should be sold or pledged to pay or secure the very debts incurred to acquire them.

I claim, then, that these mortgages must be sustained as against the

defendants—as to the road and works, and especially as to the public lands acquired—without any reference to the question whether they were made under proper statutory authority.

But this claim is unnecessary, for

IV.

The mortgages were made and the bonds issued in pursuance of legislative authority and in full compliance with existing statutory provisions.

1. The charter itself in effect conferred such power.

In the case of Galveston R R. Co. v. Cowdrey, 11 Wall, 459, the provisions of the charter were almost verbally the same.

That charter gave express power to mortgage the lands received from the state, while this *requires* the alienation of such lands within a limited time. (Sec. 15.)

Mr. Justice Bradley says in that case, (p 474): "But they insist that this power applies to outside real estate procured as ancillary to the main design of building the road, and does not apply to the right of way and the track of the railroad. But we think it is general, and applies to any real estate which the company may acquire in any way. This construction is aided by the other powers conferred by the charter, as that of borrowing money on bond or note, and of doing all acts necessary and proper for or incident to their obligations. And it is expressly declared that all conveyances and contracts executed in writing and signed by the president and countersigned by the treasurer, or any other officer duly authorized by the directors, under the seal of the company, and in pursuance of a vote of the directors, shall be valid and binding. If it were necessary to look into the charter for express power to borrow money and mortgage its property to secure the payment thereof, we think the power is found herein."

The court then goes on to show that whatever may be the effect of a mortgage of a road and its franchises without statutory aid, the legislature has validated them and given them the effect which by their terms they were intended to have, by the provisions for the sale of railroads under deeds of trust and executions, contained in the act of Dec. 19, 1857, being sections 4,912, 4,913 and 4,914, Pasch. Dig., and holds that these being, as in this case, the very provisions under which the defendants themselves claim, are remedial aud must be liberally construed.

It will be observed that the provisions of the charter of the Southern Pacific R. R. Co. cited above are almost precisely those cited in the Cowdrey case.

They gave power to *grant* and receive, and declared all conveyances and contracts duly executed valid and binding in even stronger terms than in the Galveston charter, for they expressly provided that such conveyance or contracts might be executed not only by the president and countersigned by the secretary, but "by any other officer or *person* author-

ized by the directors under the seal of the company and in pursuance of a vote of said directors."

Therefore under the authority of this case and in view of the charter of the company and the general provisions of law cited, the company had statutory power to execute these mortgages and issue bonds for any lawful purposes connected with the fulfilment of its obligations or the maintenance of its rights.

V.

But it is insisted by the defendants and adjudged by the court below that a vote of two-thirds of the stockholders was rendered necessary by the general law of Dec. 19, 1857, for the establishment of by-laws; that no mortgage could be made without a by-law; and that no such by-law was made by such vote of the stockholders.

By that act (Pasch. Dig., 4911) it was provided that

"Every railroad company shall have the power to make such by-laws as they may think proper for the government of the company, the same not being inconsistent with the objects of the charter or the laws of the state; and in the enactment of such by-laws the stockholders shall be entitled to one vote for each share of stock held by them, and may vote in person *or by a written proxy*. And it shall require a vote of a majority of not less than two-thirds of the stock of the company to establish such by-laws; and no company shall have the power to make any trust deed or mortgage *on the franchise or property* of the company unless the power is expressly given by the by-laws of the company."

This act was in force at the date of the mortgages, but it is presumed that the prohibition to mortgage the "franchise or property", refers only to the franchise and the property of the company necessary to the enjoyment and use of the franchise, and not to the lands held for purposes of sale and disposition.

But this is of no importance because here full authority to mortgage the franchise and all the property by by-laws duly adopted, and recited in the mortgages.

Record, 838, Art. 14.
Record, 846–7.

At the meeting of stockholders on the re-organization, October 3, 1859, at which W. T. Scott presided, a system of by-laws was adopted the 14th article of which provides that "The board of directors shall have power to make any trust deed or mortgage on the franchise or property of the company, for the purpose of borrowing money to construct the works upon the recommendation in writing of the president and finance committee."

This meeting was attended by all the stockholders, who had just made their subscriptions and were the only parties interested in the franchise or

property, and their action was unanimous. The minutes of the meeting are found in the books of the company and were signed by W. T. Scott, the chairman.

No question is made as to the fact that these minutes recite truly the action of the stockholders, and that the by-law giving full authority to mortgage was duly passed by a vote of more than two-thirds, and in fact, all.

But, evidently in order to comply more minutely with the law of 1857, a meeting of stockholders was held two days later at which the formal by-law recited in the mortgages was passed.

It is found in the book of minutes produced by the defendants and always in their possession.

It recites that two-thirds of the stockholders were represented, and that all voted for it.

It is signed by Joseph Fowlks as chairman of the meeting, who was the largest stockholder and the active manager of the enterprise.

The minutes of the directors' meeting which immediately followed, show that Fowlks, Richardson, Loughery and Scott were present.

They held substantially *all* the stock issued at that time.

Fowlks and Richardson alone, who were afterwards personally concerned in the actual execution of the mortgages and the issue and disposition of the bonds, owned 159,017 shares. The total subscription was 166,037 shares.

So that these two men were to all intents the owners of the road, and could dispose of it at their pleasure under the provisions of law.

Thus the first act of the company on its re-organization in October, 1859, was to put themselves in the condition required by law for borrowing money on their property and franchise, which was absolutely necessary in order to accomplish their purposes in constructing the road.

VI.

But it is asserted by the defendants and sustained by the court below, that these minutes of Oct. 5, 1859, were fraudulently concocted at a later day, and inserted in the minutes surreptitiously. The learned judge says that an inspection of the book of minutes has satisfied him that they were made falsely and fraudulently.

The chief ground for this charge is the fact that the minutes of this meeting appear in the minutes on a page preceding those of a meeting of Oct. 3, and that the body of the resolutions is in the handwriting of some one not now known to the defendants.

It is not denied that the minutes are in the regular book of minutes which has always been in the possession of the company—that they are

signed by Mr. Fowlks as chairman, who was then the largest stockholder and president—that dates and the word *unanimously* in both resolutions are in his handwriting—that the resolution or by-law is the same afterwards recited in the mortgages which were put upon record—that the by-law was open to inspection as a part of the history of the corporation to all persons subsequently interested—and yet it is asserted with vehemence that the fact that the handwriting of the by-law is unknown, and the minutes on the wrong page, is sufficient to discredit the by-law and invalidate a mortgage reciting it.

It is even insisted that the by-law was surreptitiously foisted into the minutes through the fraud of Mr. Stevenson, as a part of a scheme to defraud the company by means of these bonds.

We submit that there is no ground whatever for such assertions or inferences, and that the court erred in sustaining them.

Nothing is more common than blunders or misplacements by clerks in writing out minutes of meetings. They are never written out in the book at the time, but always copied from drafts.

Usually the tenor of such meetings as these is understood in advance, and the proposed resolutions prepared.

It seems reasonable to suppose that this one was prepared and written out fairly on the book, leaving date blank and a space to be filled if the vote should be unanimous—on the page following the stockholders' meeting of October 3, as the proper place for the next meeting of stockholders—and that two *directors'* meetings of Oct. 3d and 5th, were inadvertently reversed in their order in the book.

Such a fraud would have been wholly gratuitous and without object—not to say impossible.

The stockholders had as their first act given the directors power to make *any* mortgage, and the directors had empowered the president to mortgage any of the property of the company. (9th Res. Directors meeting, Oct. 3, 1859. Record, 849.)

Fowlks was president and Wilder secretary, and Stevenson utterly a stranger.

No mortgage was executed for more than a year after—but meanwhile they were promising bonds secured by mortgage to their contractors and dealers in iron.

In the following month (Nov. 24,) Fowlks was appointed general agent with plenary powers

(Record, 853.)

And all through 1859 and 1860 he had in his hands, besides his own $100,000 of stock, a large number of stockholders' proxies and held meetings of both stockholders and directors under them, as he had express power to do by the charter and general law.

Test. of A. T. Smith, clerk in the secretary's office in 1859 and 1860, a witness for defence. Record, 277–8, charter, sec. 17, cited above, sec. 4911 Pasch. Dig. do.

Clothed with such full power to mortgage the property of the company, and to assemble any meeting of stockholders or directors to validate his action or carry out his plans, what possible object could he have had in "falsely and fraudulently" making this resolution signed by him in person? How could he have done that falsely and fraudently, which, whenever he chose to do it would have been true and fair; he could have held the meeting alone—at any moment he desired it—being authorized to cast both stockholders' and directors' votes by proxy, by the charter and the general law.

But he, the president of the company, and its general manager with plenary powers expressly conferred, and owning the largest interest, asserts over his own signature that the meeting was held on that day, that two-thirds were represented, that their action was unanimous, and that at the directors' meeting held at the same time Richardson, Loughery and Scott were present in person and J. C. Wilson by proxy. And these were in themselves more than two two-thirds.

He is dead and cannot reassert these facts on oath, but nothing but the most overwhelming proof of fraud, in which these complainants were personally implicated, ought to shake for a moment these definite statements in writing, made by the president of the company which now assails them.

VII.

It was loudly asserted in the answers of the defendants and by their counsel on the argument below, that Mr. Stevenson had some part in this alleged fraud.

This assertion is not only wholly without proof but is wholly disproved.

Mr. Stevenson was never in Texas through the entire transactions, and had no custody or control of the books. He was elected by the board August 6, 1860, at Marshall in his absence. Fowlks and Richardson, with the secretary, went to him in New York for the express purpose of executing the mortgages.

Mr. Stevenson confused this meeting with that at which he was elected. (Record, 537.)

He was not positive and afterwards corrected the mistake.

At this meeting in New York the minute books and seal of the company were brought by the secretary for his examination and use, all the by-laws were read to him in order to satisfy him that he had power to execute the mortgages and issue the bonds as Folks and Richardson desired.

He was satisfied. If then, the by-law of October 5, 1859, had not been passed, or did not appear on the minutes, nothing would have been easier than to have passed it on the spot. There were at least four directors and the secretary, and they represented nearly all the stock. It was expressly provided by the 17th section of the charter that meetings of directors might be held when and where the directors might think best, and stockholders might make by-laws by proxy anywhere by a two-thirds vote.

But the by-law and resolution were there, as is perfectly manifest from

the fact that the mortgage and bonds had been long before prepared, and the mortgage recited therein in the precise terms.

At this time Mr. Stevenson had no thought of becoming the owner of any bonds, and was acting only in the interest of the company, at the instance of those most interested and to supply its pressing needs.

How is it possible to impute fraud to him in laying the legal foundation for issuing bonds which at the same moment were promised to the French contractors, in the contract proved on the same day, but dated September 11, 1860, reciting the fact that "arrangements are *now* being made for the issuing of construction mortgage bonds to be used in raising money for the construction of the S. P. Railroad," when the mortgages were actually executed the next day, September 12? (Record, 633.)

How was it possible to fulfil this contract openly made for the building of the whole road, in part for bonds, unless the bonds should be legally issued?

How could J. Edgar Thomson, as president, on the 23d of June, 1860, have made the contract with DeGraff & Smith to be paid in bonds, reciting distinctly the intention to mortgage and the terms, unless it was the settled purpose, legally provided for, to execute the mortgage and issue the bonds? (Record, 938–9.)

How could the bonds have been engraved under the presidency of Mr. Thomson in New Orleans, in the preceding June, and submitted to his successor in September for execution, if the very basis of the mortgage—the resolution of the stockholders, now appearing on their own books—had not been passed?

How did it happen that at the meeting of directors August 6, 1860, attested in the minutes by the secretary, a form of mortgage was presented by Dr. Fowlks and approved, if no resolution authorizing any mortgage had been passed by the stockholders, or the one appearing in the books was "false and fraudulent?"

Did all these experienced men, including Mr. Thomson, propose and contract to issue bonds without due authority, when to get such authority was but a matter of routine?

And can Mr. Stevenson be charged with any possible duty of suspecting that this simple matter of formal authorization of an act long intended and promised—attested by the former president with whom he was then called upon to deal as the responsible representative of the stockholders, was "false and fraudulent?"

It would have seemed absurd to make such a suggestion as to an act, which could have been repeated then and there in his presence, as a mere matter of formality.

The substance of the matter is that when Mr. Stevenson as president executed these mortgages in the presence of Fowlks and Richardson, owners of almost all the stock issued, he was simply carrying out by his official act a policy settled on the day of the company's organization and pledged in every form to its contractors, in pursuance of express authority legally given and spread upon the minutes, and without any personal con-

cern in the matter existing or anticipated at that time. And they were duly recorded March, 1861.

Under these circumstances whosoever should acquire, in good faith, bonds issued under these mortgages would hold them as valid liens upon the property mortgaged.

VIII.

It is insisted by the defendants and held by the court that even if the mortgages were duly executed, no bonds were lawfully issued.

Certainly 350 bonds were actually signed and countersigned and handed to the secretary, who delivered them to Dr Fowlks, the only proper custodian of them, to be used for the purposes of the company, and he had the fullest power to dispose of them.

None remained with Mr. Stevenson. Whatever was done with them afterwards, was done by the proper financial manager authorized to deal with them.

Their actual execution is proved by Stevenson, Hynson and Smith, as above stated.

And the bonds themselves are produced, with signatures and seals complete. Whatever questions may arise concerning them may be made before the master.

But it is held—

1. That there is no proof that the resolution of the directors endorsed on the bonds was ever passed.
2. That there is no proof that any bonds were issued by proper authority.

As to the resolution, it purports to have been passed Sept. 1, 1860, and to have been attested by D. C. Wilder, secretary. (Record, 644.)

It does not appear upon the minute book.

It must have been passed in New York immediately upon the arrival of the secretary, who had been sent on by Fowlks with the books and seal.

See letter of Fowlks, Aug. 25, 1860. (Record, 663.)

In this letter Fowlks also advises Stevenson of the action of the board August 6, 1860, appointing an executive committee of five, with plenary powers, three of whom should be a quorum to act on all subjects. (Record, 857.)

Fowlks, Richardson and Stevenson were on this committtee and had full power. Other directors were also in New York, and the occasion was a vital one for the interests of the road—and the urgent purpose was to make a mortgage and issue bonds in order to fulfil their contracts then made or in progress.

Can it be supposed that this resolution asserted to have been passed by the men who had the power to pass it, and desirable for the very object in view, was not passed?

The very act of writing it, in one of their daily meetings, in preparation for the issuing of bonds, was the passing of the resolution.

Nor is the fact that it was not afterwards recorded in the minutes of any moment. It was extremely likely to be omitted, as were probably the records of many other meetings held in the pressure of that time.

The secretary is dead and his loose papers scattered. The men who had the power and treated it as their duty to pass this resolution, asserted by their signatures and their action that it was passed, and it must be conclusively presumed to have been done as against the company itself and those who derived the benefit of it.

In Wells v. Rahway Rubber Co., (4 C. E. Green, 402), similar objections were urged against a corporation mortgage.

Chancellor Zabriskie held—

"The defence of want of authority to execute the mortgage does not appear to me to be sustained. Besides the presumption arising from the fact that the mortgage is executed under the corporate seal, and signed by the president and attested by the secretary of the company, it appears by the minutes that its execution was authorized by a meeting held on the 21st of February, 1867.

"At this meeting, three of the five directors were present, and although there is some proof that the entry is incorrect in stating that all three concurred in the resolution, yet it appears that two did concur unconditionally, and as of five directors three are a quorum, and two a majority of the three, the resolution must be taken as valid and binding. The objection to the regularity of the entry in the minute books, that it was made by a stranger, and never read to and approved by the board, is obviated by the fact that the entry was made under the direction of the secretary, from a minute made by him at the time on a loose sheet of paper, and after entry was compared with this sheet by him. It is not necessary that the minutes of a corporation should be written up by the secretary in his own handwriting, or that they should be approved by the board. And in fact, if it was shown that the resolution had been passed by the board when lawfully assembled, it would be valid, although never entered upon the minutes."

In Wheaton v. Dandridge, (12 Wh. 69,) Mr. Justice Story says:

"We do not admit as a general proposition that the acts of a corporation although in other respects rightly transacted are invalid merely from the omission to have them reduced to writing, unless the statute creating it makes such writing indispensible as evidence or to give them obligatory force.

The law itself, for the purpose of strengthening the infirmity of evidence and upholding transactions intimately connected with the public peace, and the security of private property, indulges its own presumption. It presumes that every man in his private and official character does his

duty unless the contrary is proved; it will presume that all things are rightly done unless the circumstances of the case overturn this presumption."

In McMichael v. Brennan, 31 N. J. Eq., (5 Stewart), 499, a deed in satisfaction of a mortgage to a corporation was disputed because the resolution authorizing it did not appear in the minutes. The chancellor says:

"The passage of a resolution by the board of directors giving authority to take the deed, is shown, and the contents of the resolution are proved. That it cannot be found in the minutes, and the secretary does not remember that it was passed or offered, cannot countervail the positive testimony of the president and two other members of the board and the attorney of the company, that it was adopted. The deed itself is corroborative of their testimony."

See also U. S. v. Fillebrown, 7 Pet. 28.

As to the authority to issue the bonds.

It will be observed that in the by-laws established by all the stockholders at their first meeting, Oct. 3, 1859, it was provided that the directors might make *any* mortgage of the franchise and property on the recommendation, in writing, of the president and finance committee.

And that by the undisputed resolutions of the directors August 6, 1860, the form of mortgage presented was approved and the executive committee was authorized to modify and amend it at discretion.

And that by resolution 4 at that meeting it was provided that "one million of dollars of the bonds is *hereby* authorized to be issued under the said mortgage and the same to be made convertible into the stock of the company for a period of two years from the date of the issue."

This is precisely what was done by the resolution endorsed upon the bonds, dated Sept. 1, 1860.

It was done by three of the executive committee, who were distinctly clothed with the amplest power by the 6th resolution of Aug. 6.

(Record, 855.)

How then can it be said that when Stevenson signed and Richardson countersigned only 350 of the bonds expressly in accordance with this action, and delivered them to Fowlks, thus involving the lawful quorum of the executive committee in the transaction, that the bonds were issued without due authority?

The truth is that they were provided for and authorized by all the stockholders; they were approved and ordered issued by the directors at regular session in Marshall; they were actually signed, issued and delivered to the lawful custodian by a quorum of the executive committee clothed with full power, and were disposed of by him for the lawful purposes of the company.

The issue, however, was only a little over one-third of that which they had power to make,—the rest were not then needed, and their use was made impossible by the war, then just at hand.

IX.

It is said that the mortgages and bonds were void because—

1. The president, Stevenson, was not lawfully elected, and
2. Because the meeting of August 6, 1860, was not held within the state of Texas.

Both asserted facts would be immaterial if they were true.

Undoubtedly the board attempted to elect Mr. Stevenson president, and he acted as such in the open and vigorous manner, and his acts were fully recognized and acquiesced in. (Record .)

Persons acting publicly as the officers of a corporation will be presumed rightfully in office, so far as it regards third persons, and their official acts will be binding on the corporation to the extent of the rights of such third persons.

See many cases cited in Abbott's Dig. Corp., 549.
Rockville and Washington Road v. Van Ness, 2 Cr. C. C. 429.
U. S. v. Dandridge, 12 Wh., 70.

A person who makes a contract with trustees illegally elected, but in possession of corporate property, without knowledge of the illegality, may enforce his claim, and the fact that he himself was one of the unlawful trustees, does not alter the case—in the absence of bad faith.

Ebaugh v. German Ref. Church, 3 E. D. Smith, 60.

But there was no infirmity in his election.

The directors, by section 5 of the charter, had express power to fill any vacancy in the board and to elect one of their number president.

The vacancy occurred by the resignation of Thomson, who was also president, and they filled the vacancy with Stevenson and made him president. He owned more than five shares of stock and was therefore eligible. He gave his seock to the secretary to be transferred. (Record 539.)

It was provided by the by-laws established by the stockholders at their organization, Oct. 3, 1859, that a vacancy occurring in the board by death, resignation or otherwise, might be filled by the board, the appointment to hold till the next annual election. (Record, 838.)

Thus both charter and by-laws gave the power to fill the vacancy caused by Thomson's resignation, and it was done by electing Stevenson, who acted openly and continuously.

2. The meeting at which he was elected was held in Marshall.

The record on the minutes of the company shows it, and the vague memory of directors with little interest in the road, except to defeat the claims of the complainants, cannot avail to impeach it.

But if the meeting at which he was elected as well as that which ordered the issue of bonds, was held out of Texas, it could not invalidate the election of the bonds.

Galveston v. Cowdrey, 11 Wall, 476.

In this case the same objection was urged. The court says:

"It is not denied that the mortgages were executed in good faith, under the corporate seal, and signed by the president and countersigned by the treasurer, and duly recorded. Supposing the complainants to be *bona fide* holders of the bonds, the question raised by this objection amounts to this: Can a corporation repudiate a mortgage given to secure its bonds held by *bona fide* holders on the ground that its directors authorized its execution by a resolution passed outside of the limits of the state, the mortgage being in other respects executed and recorded in due form of law? Can it take all the benefit of the transaction, get off its bonds on the business community, and then repudiate its mortgage for such a cause? We have not been referred to any case like this.

This case definitely disposes of the last objection, even if the charter did not expressly provide for meetings where the directors should think best.

In view of the financial transactions of such a company, formed in a remote state, such provision and action were manifestly indispensable.

X.

But, assuming that the company by its charter and by-laws, had lawful power to execute the mortgages and issue the bonds, all discussion as to the mode and details of exercising it is superfluous.

In Pompton v. Cooper Union, 101 U. S., 204, this court, recapitulating the numerous cases on the subject, says: "The bonds in question have all the properties of commercial paper, and in the view of the law they belong to that category. This court has uniformly held, when the question has been presented, that where a corporation has lawful power to issue such securities, and does so, the *bona fide* holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital. These rules are the settled law of this court."

See also a late discussion in Mut. Benefit v. City of Elizabeth, 13 Vroom, 235; same v. Singer Sewing Machine Co., do. 249.

The only question, therefore, as to the validity of the lien of these bonds on the property mortgaged, at the time they were issued, is, are the complainants, or any of them, *bona fide* holders of the bonds claimed by them respectively?

In Galveston v. Cowdrey, the court says: "If this (that they were not *bona fide* holders) were true in regard to some of the bonds, it is not pretended to be true with regard to all of them; and the question, what particular bonds were wrongfully issued, if a material question, is proper-

ly examinable in the master's office, where all bonds are to be presented and passed upon, if not already done. And the decree will stand only for the benefit of such bonds as appear to be entitled to its benefit."

Therefore if *any* of the bonds claimed are in the hands of *bona fide* holders the decree must be reversed, and then the status of all can be scrutinized and determined in the master's office.

It is held by the court below that there is no proof that any are *bona fide*.

In this we respectfully submit he plainly erred.

Smith received ten bonds from Fowlks, the financial manager, entrusted by formal resolution with all the assets, upon his contract for work done, in November, 1860, soon after their issue. (Record, 481.)

The bonds are produced and the assertion is not attempted to be disputed. Nor is Smith in the slightest degree implicated in any alleged fraud. He was not an officer, but a mere contractor, who had given the value to the road which furnished the security offered.

And they were given in pursuance of his contract, made before the bonds were issued.

As to the other 20,000, they were given to him by Holman, the vice-president, and the president of the company, after the fraudulent sale—upon the same contract on which they were largely in debt to him. (Record, 482.)

These bonds also are produced and the statement is not denied.

It must therefore be taken as proved that Smith is the *bona fide* holder for full value, of thirty bonds.

J. D. Arundel produces two bonds and proves from whom and where he bought them and what he paid for them.

(Record, 173, 692.)

And his statement is not denied.

He is strictly a holder for value of bonds bought in the market.

Gillam, Flournoy and Hyman produce together twenty-three bonds, and it is not suggested that they are in any way concerned with the company or its dealings, and in the absence of proof they must be presumed to be *bona fide* holders, or at most be required to make proper proof before the master.

Thus there are 55 bonds held by complainants, entirely beyond the scope of any suspicion of unfair dealing, who are entitled to stand upon the principles applied to such holders, announced as the settled law of this court in Pompton v. Cooper Union.

So also with regard to the 48 bonds held by Mr. Stevenson as security

for money paid for the use of the company, under the circumstances sufficiently detailed in the statement of the case.

As to these he must be held to be a *bona fide* holder, without reference to his position as president and trustee.

As to the 100 bonds taken for services, etc.

These were taken by him while he was president upon a contract made with his co-directors.

We admit that he is to be judged, with respect to them by the strict principles applied by courts of equity to the dealings of persons standing in fiduciary relations.

These principles are so clearly stated in the following recent cases as to make further references unnecessary.

Twin Lick Oil Co. v. Marbury, 91 U. S., 587.
Gardner v. Butler, 30 N. J. Eq. (3 Stewart,) 702.

The substantial result of these doctrines is that while a director or officer of a corporation is properly held to a larger measure of good faith in his dealings with it than a stranger yet if he has made advances or rendered services to it in good faith he is entitled to just reimbursement and fair compensation, and is also entitled to the benefit of all securities fairly obtained.

We wish to place Mr. Stevenson strictly within these limitations of his rights, as to these bonds.

His position is briefly this:

From August, 1859, to August, 1860, he had no official connection with the company, and occupied no fiduciary relation. He had had very large experience in organizing and pushing forward railroad enterprises. He was then and long continued to be most successfully engaged in such enterprises in Tennessee. His time was very valuable, and his services most desirable. His present absorption in similar duties made his immediate assistance more important to this enterprise, as affording opportunities to meet their urgent needs.

Under these circumstances he was engaged as agent of the company, especially to promote its interests in Congress and among capitalists and contractors, at a salary of $30,000 a year.

He devoted himself to this duty, under the presidency of Mr. Thomson and in concert with Dr. Fowlks, the general financial manager, until August, 1860.

In the summer of that year large offers were made to him to accept the presidency—$100,000 in cash and bonds—which were not accepted.

Record, 496.

But in August, 1860, he was elected president, at the same salary he had agreed to take as agent, and entered at once upon his duties.

He executed these mortgages in pursuance of the long settled policy of the company, and in order to comply with contracts already made.

He made contracts to build the whole road, and went to France and England to carry them into effect.

He left $10,000 of his own money on deposit to meet present needs, and authorized Fowlks to draw on him personally.

Record, 563.

He negotiated a loan of $30,000, and made himself personally responsible for it, and afterwards paid it. He obtained iron from Peabody on his own credit, and sent it to New Orleans.

He did all in his power to fulfil the expectations of those whom he served, and was only foiled in his efforts by the war.

He returned and still continued his labors in every available direction, sent supplies to New Orleans, and devoted himself to the work, until the war blockaded all private enterprises, put an end to all successful efforts, and made it necessary to await the return of peace.

Meanwhile, as speedily and secretly as possible—in the midst of war—the entire property was sold by a county sheriff for a paltry debt, by a scheme concocted by his co-directors, with no notice to him, and the road was quietly taken possession of by those who had but a trifling interest in it, and held for better times, free, as they supposed, from all prior liens and obligations, secure from the risks of confiscation, and safe from future claims of Northern creditors or stockholders.

Here the active services of Mr. Stevenson necessarily ended. He had no notice of these transactions, and was never advised of any termination of his office. It never did terminate except through the fraudulent scheme by which the property of the company was captured and held.

He has never been paid for services as agent or president, or for advances or disbursements, but $6,000.

In the summer of 1861, when it was found impossible to pay his salary, and his services were still important, he was urged to accept bonds for two-thirds of past and future salary, expecting to get cash for the balance. 100 bonds were so accepted and delivered to him by the financial agent in whose custody they had been since their issue in September, 1860.

He holds those bonds and produces them in proof, as just liens upon the property to secure simply what is justly due to him as a creditor of the company.

For that, he claims to hold them strictly for value in good faith. And he is ready to submit to the most rigid scrutiny before the master, as to the nature and extent of his claims, the amount of his receipts, the circumstances under which the bonds were received, and the fairness of his dealings with the company.

The proof as to his relations with the company will be found chiefly in his testimony, extending from page 535 to 589, in the Record, and in the Exhibits from page 596 to 680, and especially the letters from Fowlks and Richardson, pages 652 to 673.

But it is believed that the fact that many of the bonds are held by the complainants in good faith for value is so clearly proved that the decree must be reversed, and all questions as to individual bonds remitted to the court below or to the master.

XI.

But, assuming that the mortgages were lawfully executed, and that bonds, duly issued, are held by the complainants in good faith for value, it is still insisted that all their rights and their lien upon the property mortgaged, are cut off and extinguished by the judicial sales.

The mortgages were dated August 26, and proved September 12, 1860, and duly recorded March 1, 1861, at 10½ A. M.

If a lawful judicial sale, free from fraud has been made of the mortgaged property, by virtue of a valid lien, *prior to* the mortgages in question, and without notice of them, and without power of redemption, it must be admitted that the complainants' rights are extinguished, but not otherwise.

No sale by virtue of any lien which accrued subsequently to the record of the mortgages and the actual issuing of the bonds, can have any effect to disturb the rights of these bondholders.

Now, only the sale of Sept. 3, 1861, is pretended to have been made under such prior lien.

It is important to understand just what these prior liens were through which an entire railroad worth over a million of dollars was transferred free of all incumbrance.

They were four common law judgments, viz.:

J. M. Saunders and others, $377.09, April 6, 1860, execution levied Aug. 9, 1860.

Henry Vickland, $3.500, Sept. 26, 1880, execution levied July 11, 1861.

J. B. Williamson, $1,000, October 23, 1860, execution levied Jan. 3, 1861.

Amelia Sevanson $2,480.50, Oct. 27, 1860, execution levied Jan. 3, 1861.

The total was $7,354.59.

But one of these judgments was prior in date to the mortgages, and that was the Sauuders judgment, $374.

This was wholly for costs in some suit and $290 of it was due to the clerk.

(See bill, Record, 283.

Upon this sum of $290 a credit of $277 was endorsed by the clerk leaving $13.75 due to him.

This balance was paid to him Sept. 3, 1861. the day of the sale by J. S. Holman, the vice-president of the company, and the claim was assigned by the clerk to him.

This left but 97.09 due on the judgment of which 13.75 belonged to the vice-president.

The levy of this execution on this judgment was made Aug. 9, 1860,

upon "all the right, title and interest that the S. P. R. R. company has in and to the railroad situate in Harrison county and state of Texas, the eastern terminus being at Swanston's Landing and running twenty-five miles in the direction of Marshall in said county, and also the franchise right, privileges and appurtenances thereto belonging and cars, locomotives and rolling stock."

Upon this first lien for $97.09, of which $13.75 belonged to the vice-president and $24 to E. A. Blanche, the company's engineer, for witness fees, and $40.75 to the sheriff who sold it, a railroad of 25 miles in length, built for $26,000 a mile—with all the cars, locomotives and equipments—and the franchise to be a corporation and receive six millions of acres of state lands—was sold for $7,500 to the agent of the company and the following return was endorsed on the execution:

"The within described rights, privileges, railroad bed, franchise, locomotive cars, rolling stock of the Southern Pacific Railroad Company, was this day offered for sale according to law, and H. S. Fulkerson being the highest and best bidder, bidding the sum of $7,500, the same was knocked off to him and he was declared the purchaser thereof, and the sum of $105.59 of the aforesaid amount is applied to the payment of this claim which satisfies this execution—clerks' cost, sheriff's cost, commissioners' cost.

A. B. CRAWFORD, *Sheriff.*
By S. T. Geer, *Deputy.*"

It will be observed that there was no levy upon or attempt to sell the state lands acquired and covered by the mortgages in question—but "the railroad, road bed, franchises, rights, privileges, and appurtenances thereunto belonging, and cars, locomotives and rolling stock."

See sheriff's deed; Record, 83.

It will be also observed that, according to the claim of the defendants, the road was then clear of any valid mortgage, and that this judgment recited in the sheriff's deed to be in favor of J. M. Saunders and others, *for the use of the officers of the court*, was the first lien upon the entire property—and that the pittance remaining due (in great part to the sheriff himself) could have been satisfied by the sale of the poorest freight car in the rolling stock.

But for this pittance the whole road was sold, and bought in by the directors through Fulkerson, their agent, for $7,500, borrowed of a stockholder for the purpose, to be returned after the scheme was accomplished—and out of this money the balance of the first execution, $105.59 was paid, of which $13.75 must have been returned to the vice-president, who had bought it on the day of the sale from the clerk. ✕

The other three judgments were all subsequent in date to the mortgages. But two of them—Williamson, $1,000, and Swanson, $2,480.50—were levied before the recording of the mortgages.

The Wickland judgment, $3,500, was subsequent in date, and not levied until after the record.

✕ And this judgment was received against the old company — before the sale and reorganization in Sept. 1859.

It appears by the return of the sheriff in these three executions, that on the 3d of Sept., 1861, Holman, the vice-president, paid all the clerk's costs, amounting, with those in the Saunders' case, to $102.82, and took a transfer thereof. (Record, 286–289.)

The levies in all the cases were the same.

The property was bid off by H. S. Fulkerson for $7,500, of which $6,000 had been borrowed from Field, in New Orleans, for the purpose, and the balance was made up in notes and acceptances. (Record, 740.)

Thus all liens prior to the mortgages were satisfied, out of moneys borrowed for that purpose, and soon afterwards repaid by the company out of its funds, or out of notes and acceptances on hand. (Record, Fulkerson's test., 741.)

Immediately after the sale, and in pursuance of the scheme, Fulkerson made a deed to the company of the date of September 7, 1861, reciting his purchase and conveying thus, "being desirous of making the best use of said purchase for the interest of said road and the objects contemplated by the charter authorizing the construction, and having no desire to make a speculation of the same for my own benefit, hereby assign, set over and convey unto the Southern Pacific Railroad Company, formed after and in virtue of said sale, in accordance with the laws of Texas, in the town of Marshall, Harrison county, Texas, on the 6th day of September, 1861, of which company J. S. Holman is president, said property so purchased and in said deed described, reserving for myself the place and portion of a corporator under said purchase, and not divesting myself of such position under such purchase by this deed; this conveyance being made by me, however, upon the express condition that the debts be paid in the manner to the extent aforesaid and provided for by a resolution of the board of directors, passed on the 6th day of September, 1861; and upon the further condition that the first board of directors, that is the present board, shall have the power to determine what stock held in the sold-out company, formed as aforesaid, in virtue of said purchase, and the terms and conditions upon which the same shall be admitted, imposing on said directors the request that their action in this regard shall be for the best interests of the company, and as nearly just as they can make it; and upon the further condition that the money paid out by me in making said purchase shall be replaced with interest."

The frankness of this document and the generous "precatory words" near the end, imposing on his new associates the trust of making their action "for the best interests of the company and as nearly just as they can," would seem to dispense with the necessity of any inquiry whether this was really a judicial sale to satisfy just claims, with the effect of extinguishing all other liens, or but a mere scheme or device to use some paltry judgments, which a fraction of any day's receipts would have paid, as a means of shielding the property from the disasters of war, and extinguishing the rights of all who were regarded as enemies.

But the circular issued by Holman soon after, October 1, 1860, is still more suggestive. It is found on page 679 of the Record.

It recites the sale, and informs the stockholders that their rights are

extinguished, but advises them that since their money helped to create the valuable property acquired by the sale, and the purchasers did not desire to make a speculation, the coöperation of the old stockholders was desired. It suggests terms and says they are the same imposed on those whose money contributed to the purchase. It announces, however, that the policy of never admitting northern stock or bogus stock, upon any terms, is fixed and unalterable. It states the value of the property at over one million of dollars, and says that the enterprise has heretofore shown itself to be indestructible, as its frequent emerging from past difficulties clearly establishes. And it concludes with an averment that in the purchase and reorganization "there was no collusion, no bribe or bonus, and no plan of subserving the interest of any individual; the leading object of the parties acting being the preservation of the enterprise, and freeing it from every obstacle to its success."

The obstacles referred to were evidently all the debts of the company which they did not choose to pay—the mortgages carefully cut off as they hoped, by leaving a trifling balance of the only prior judgment unpaid—and all stock held by northern enemies.

This was his idea of fulfilling the request of Fulkerson to act "as justly as they could."

It seems unnecessary to refer to the evidence as to this transaction in detail. It is carefully collated and commented on in the brief filed by Mr. Herndon, pages 34 to 49, where all the references to the confused and voluminous record can be obtained.

But especial reference is made to the testimony of James Turner, page 218, &c.

He was the attorney of Wickland and Williamson, holding judgments for $4,500. He shows that Pendleton Murrah, the attorney of the company, had arranged with him and Mr. G. McKay, controlling other executions, to abstain from enforcing them, assuring him that money would be furnished by Mr. Stevenson, the president, to pay them; that he had no knowledge of the sale till the morning of September 3, when it took place; that he and McKay then remonstrated with Murrah and referred to their agreement for delay; that Murrah told him the sale should take place, and said an attorney was a fool to believe everything that was told him; that he also protested to Fulkerson, but was quieted by his assurance that they did not intend to cut off any genuine claim, and that his claims and those of others who complained at the time of being overreached, were provided for after the sale.

In view of these facts and the whole transaction, as detailed in the record, and especially the fact that Stevenson had authorized Holman to draw on him for enough to pay these claims, (Record, 563) it seems superfluous to argue that this was not a judicial sale at all, but only a clumsy and fraudulent device to cut off such creditors and stockholders as the conspirators did not see proper to pay.

In the language of Mr. Justice Strong in Jackson v. Ludeling, 21

Wall., 616–621, it was "nothing less than a great wrong perpetrated by the agency of legal forms."

That case is so similar to the present (though by no means so flagrant), and its conclusions so applicable, that it is not deemed necessary to encumber this brief with other authorities.

There the court held "it is impossible to sustain such a transaction. Throughout it was grossly inequitable. That the property was sacrificed by means of an unlawful and wide-spread combination is abundantly proved, and that the directors who were parties to it and who became the purchasers, were guilty of an inexcusable violation of the confidence reposed in them, admits of no doubt. Ludeling, it is true, was not a director, but he was a leading member of the combination and its chief agent to carry out its plans."

Here the result must be the same. Fulkerson, the purchaser, was not only a member of the combination, but had been and was an agent of the company.

Of the new directors who appear in Holman's circular, Holman was vice-president and Loughery a director, and Murrah the attorney of the company, whose whole property they thus attempted to acquire. They owned but a trifling interest in it, while Fowlks and Richardson, who owned almost all, and Stevenson, the president, who were striving to sustain the enterprise, had no information of the scheme and took no part in it, except to suffer from its consequences.

The parties who obtained control by this sale found it necessary to resort to Mr. Smith for a new contract for construction, after compelling him to submit to a loss of over $200,000. And they were also obliged to resort to the French contractors Bellot des Minieres Brothers & Co., with whom Stevenson had negotiated before the war.

Record, 612–618.

It is significant, and almost amusing, to observe that the committee of the directors, including Mr. Holman, in a report made February 12, 1866, point out that the specifications and work generally, "set forth in the contract of the company by V. K. Stevenson *president*, with the party of the second part (the French firm), dated September 11, 1860, is not to be considered changed by the late contract" made with that company.

Record, 618.

And that in the contract itself, which is between The Southern Pacific Railroad Company and Bellot des Minieres Brothers & Co., and dated November 14, 1864, it is "agreed as follows: The contracts and agreements made on the 12th day of September, 1860, in the city and state of New York, between the said *parties of the first part*, represented by *its president*, Vernon K. Stevenson, *who was duly authorized to that effect*, and M. M. Bellot des Minieres Brothers & Co., parties of the second part, represented by M. E. Bellot des Minieres, are modified in the following manner," etc.

And article 5th provides that the contractors shall not be required to take construction bonds, as in the first contract, but may take stock. And article 6 provides that "the contract and agreement of Sept. 12, 1860, between V. K. Stevenson, the then president of the Southern Pacific Railroad Company, and the parties of the second part, are fully confirmed and renewed. (Record, 614.)

It is plain from this agreement that the purchasers at the sale of 1861, were quite unconscious of any actual change in the organization or identity of the company; that they were perfectly of the acts of the president in promising the French firm construction bonds; that he was in fact the president of the company, and fully authorized to act in these important matters; and that as soon as the exigencies of war would permit, they were eager to avail themselves of the result of his efforts.

The conclusion, then, is irresistible that the sale of Sept. 3, 1861, did not work any extinguishment of existing rights or liens, but merely produced a change of possession, which continued undisturbed in consequence of the obstacles caused by the war, and enabled the conspirators, as soon as peace gave the opportunity, to carry on the enterprise through its various phases, to the final transfer to and consolidation with The Texas and Pacific Railroad Company, chartered by Congress.

XII.

If this conclusion is correct, it is unimportant to consider the circumstances of the three other pretended sales.

They were all made under color of liens long subsequent to the date and registry of the mortgages in question, and subject to the rights of all holders of bonds issued under them.

If for any reason it is thought necessary to look into these sales the facts will be found fully collated and discussed in Mr. Herndon's brief, pages 50 to 68.

They were all in 1868, and were all parts of a contrivance on the part of the directors and a few stockholders, agents and creditors to form a ring to produce an apparent necessity for judicial sales; to absorb the property committed to their care; and to use the forms of law to give effect to their purposes and shield their acts and motives from scrutiny.

The scheme was not less flagrant or clumsy than that so strongly denounced by the court in Jackson v. Ludeling, and must share the same fate, if it shall become important to give it any consideration.

XIII.

These forms of judicial sale being demolished the road stood in 1871 encumbered with the lien of such bonds as had been issued under the mortgage of August, 1860.

They were not many and could readily have been satisfied, if the payment of them had come within scope of Mr. Fulkerson's injunction to his fellow conspirators to "make their action as nearly just as they could."

They did not see it in that light, but chose to ignore the claims of these bondholders, who were chiefly from the North (where Stevenson had removed); to consider the liens extinguished by their sale; to deny that Stevenson was ever president, while adopting his contracts as such; to pretend ignorance of mortgages duly recorded and bonds referred to in

their own contracts; to repudiate corporate action recorded in their own minutes; to denounce their own records as forgeries though over the genuine signature of their earliest president; to file a bill in a county court, to invalidate and declare void mortgages and bonds of the existence of which they now profess to be ignorant; to endeavor to cut off the parties who held these bonds by a decree by default on publication in a local newspaper in Texas; and, in preparation for their union with the Texas Pacific, to wipe out by a judicial decree without notice the recorded liens which remained, as they were conscious, undisturbed by their sham sales.

Having determined on this course, they obtained their decree annulling the bonds, March, 1871, and in seven days after concluded their union with the Texas and Pacific, Mr. Thomas A. Scott being president of both roads, and presiding at the ceremonies.

XIV.

The act of Congress authorizing the consolidation was passed March 3, 1871. (16 Statutes, 573.)

It provided for the incorporation of the Texas Pacific Railroad Company, with power to construct a road from a point at or near Marshall to El Paso and thence to the Pacific, and authorized the company to purchase the stock, grants and franchises of and consolidate with any other company on the same route.

And section 6 provided that all the property and rights of the purchased or consolidated roads should vest in the Texas Pacific, and that in all contracts with other companies for consolidation or purchase the indebtedness or other legal obligations of said company should be assumed by the T. P. R. R. Co., as might be agreed on, and that no purchase or consolidation should impair any lien which might exist on any of the railroads so consolidated or purchased, but said company should not assume debts or obligations to an amount greater than the cash value of the assets received.

By deed dated March 21, 1872, The Southern Pacific Railroad Company, for the consideration of three millions of dollars, conveyed all its franchises and property to the Texas Pacific, and became consolidated with it under the act of Congress, and the Texas Pacific Company assumed its floating debt, not to exceed in amount $700,000, and its debt to the state, not to exceed $250,000. (Record, 28.)

The Texas and Pacific Railroad Company was bound to assume *all* its debts and obligations, whatever their amount. The agreement to limit them to $700,000, of course, had no effect upon that liability.

The liens were unimpaired. The decree to annul the mortgages had been made a few days before, and was supposed to have extinguished them—but that decree was afterwards reversed and the lien remained. Undoubtedly if that decree had not been made these bonds would have

been distinctly provided for. They were small in amount in view of the magnitude of the transaction, and the value of the property and franchises transferred.

They relied upon the decree by default, and took no notice of these claims. They were supposed to be doubly cut off—by the fraudulent sales, and by the decree without notice.

Both proved ineffectual, and the liens remain.

We submit that their validity as against the property mortgaged, which includes all after acquired property and rights, in the hands of the Texas and Pacific Railroad Company, ought to be declared by this court and the decree reversed, and the case remanded, to the end that the amounts due to the complainants respectively on their coupons may be ascertained, and a decree made which shall secure the payment of the coupons with interest, and establish the lien on the property for the principal not yet due.

A. Q. KEASBEY,
Of Counsel with Appellants.

January 5, 1880.

Supreme Court of the United States

OCTOBER TERM, 1880.

No 186.

V. K. STEVENSON, et al., Appellants,

vs.

THE TEXAS and PACIFIC RAILWAY COMPANY et al.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLEES.

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JAMES LOWNDES,
Of Counsel.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1880.—No. 186.

V. K. STEVENSON ET AL., APPELLANTS,

vs.

THE TEXAS AND PACIFIC RAILWAY CO. ET AL.

Appeal from the Circuit Court of the United States for the Western District of Texas.

The above title includes two causes—that of V. K. Stevenson against The Texas and Pacific Railway Company *et al.*, and of W. H. Smith against the same defendants.

By order of the court below the latter suit was consolidated with the former. Record, p. 953.

Both causes were afterwards argued together, (Record, p. 878,) and were disposed of by the same decree; the bill of each complainant, appellant here, being dismissed with costs. Record, p. 879.

They involve mainly the same questions.

For the sake of convenience, this brief will be directed to the examination of the case of Stevenson, but will necessarily embrace that of Smith, though some features of the latter may require separate notice.

On the 16th of April, 1873, V. K. Stevenson filed his bill to establish and enforce against the Texas and Pa-

cific Railway Company two mortgages or deeds of trust, both dated on the 25th of August, 1860, and alleged to have been made by the Southern Pacific Railroad Company to secure the payment of certain construction bonds, with coupons attached, thereafter to be issued from time to time by the latter company.

The Southern Pacific Railroad Company was chartered by the State of Texas on the 16th of February, 1852, under the name of the Western Pacific Railroad Company.

Several amendments were made to the charter, by one of which the name was changed to the Southern Pacific Railroad Company.

In June, 1858, the road and franchises were sold to J. N. Saunders under a deed of trust, and a new company was organized under the following provisions of the general railroad law of Texas, passed on the 19th of December, 1857; Paschal's Dig., art. 4912, p. 820:

"The road-bed, track, franchise, and chartered rights and privileges of any railroad company in this State shall be subject to the payment of the debts and legal liabilities of said company, and may be sold in satisfaction of the same; but the said road-bed, track, franchises, and chartered powers and privileges shall be deemed an entire thing, and must be sold as such; and in case of the sale of the same, whether by virtue of an execution, order of sale, deed of trust, or any other power, the purchaser or purchasers at such sale and their associates shall be entitled to have and exercise all the powers, privileges, and franchises granted to said company by its charter or by virtue of the general laws of this State; and the said purchaser or purchasers and their associates shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges, and benefits thereof in the same manner and to the same extent as if they were the original corporators of said company, and shall have power to construct, complete, equip, and work the road upon the same terms and under the same conditions and restrictions as are imposed by their charter and the general laws of this State."

This organization lasted but a short time. The road and franchises were again sold out under executions on the 6th of September, 1859, and R. V. Richardson became the purchaser, and on the 3d of October, 1859, a new company was organized.

The life of this organization was also very brief.

It extended only to the 3d of September, 1861, when, under executions, the road and franchises were again sold out, and H. S. Fulkerson became the purchaser, and a new organization was formed.

This last organization continued until the 5th of May, 1868, when it was sold out under twenty executions, and R. B. Hall became the purchaser.

This sale was after the repeal, by the Constitution of 1866, of the above-mentioned railroad law. Paschal's Dig., p. 943, sec. 36.

The judgments, however, or many of them, had been recovered before such repeal.

On the 6th of October, 1868, the road and franchises were again sold under a decree to foreclose a mortgage, and said R. B. Hall became the purchaser.

Such a sale is expressly excepted from the repeal of the act of 1857.

The provision making such exception is as follows:

"And the franchises and corporate privileges of any incorporated company shall not be sold under judgments, except for the foreclosure of mortgages or liens created in the manner prescribed by law." Pasch. Dig., p. 943, sec. 36.

Under these purchases a new organization was formed.

On the 4th of April, 1868, the portion of the road of the Southern Pacific Railroad Company lying in the State of Louisiana, and between the city of Shreveport, in that State, and the line of the State of Texas, which, several years after the mortgages, had been leased to said company by the Vicksburg, Shreveport and Texas Railroad Company

for a term of years, was also sold and purchased by judgment creditors. Upon this purchase a company was organized in Louisiana, under the law of that State, by the name of the Southern Pacific Railroad Company, and, under the above sales, made in Texas in May and October, 1868, to R. B. Hall, a new organization was also formed in that State.

These companies consolidated, and thus the Southern Pacific Railroad Company as organized in 1868 owned or controlled the entire road, a distance of about forty miles long, both in Texas and Louisiana.

This company existed until the 21st of March, 1872. The history and proceedings of the foregoing different organizations of the Southern Pacific Railroad Company, under the respective purchases of Saunders, Richardson, Fulkerson, and Hall, will be found in the original record books, numbered 1, 2, 3, and 4, mentioned in the decree of the court below, and ordered to be transmitted to the clerk of this court, (Record, p. 880,) in whose custody they now are.

The mortgages set up in both suits are alleged to have been made and the bonds issued by the company organized under the Richardson purchase, and hence a full transcript of all the acts and proceedings, real or pretended, of that organization is made part of the record, and will be found pp. 833 to 860.

By act of Congress of the 3d of March, 1871, (16 Stat. at Large, p. 575,) the Texas and Pacific Railroad Company was chartered, and by act of Congress of the 2d of May, 1872, its name was changed to the Texas and Pacific Railway Company.

By the fourth section of the former act power was given to purchase "the stock, land grant, franchises, and appurtenances of, and consolidate, upon such terms as may be agreed upon by the parties, with any railroad company heretofore chartered by congressional, state, or territorial authority, on the route prescribed in the fourth section of

this act; but no such consolidation shall be with any competing through-line of railroad to the Pacific Ocean." And by section 6 it is provided that "the rights, land grants, franchises and appurtenances, privileges, and property of every description belonging to each of the consolidated or purchased railroad company or companies, as herein provided, shall vest in and become absolutely the property of the Texas and Pacific Railroad Company; provided, that in all contracts made and entered into by said company with any and all such railroad company or companies to perfect such aforesaid consolidation or purchase, the indebtedness or other legal obligations of said company or companies shall be assumed by the said Texas and Pacific Railroad Company, as may be agreed upon, and no such consolidation or purchase shall impair any lien which may exist on any of the railroads so consolidated and purchased; but said company shall not assume the debts or obligations of any company with which it may consolidate or purchase as aforesaid, to an amount greater than the cash value of the assets received from the same."

On the 21st of March, 1872, the Southern Pacific Railroad Company, acting under a resolution of its stockholders and the authority of an act of the Legislature of Texas, sold out, by deed of that date, its franchises and property to the Texas and Pacific Railway Company. A copy of the deed is set out in the Record, p. 28.

The consideration was $3,000,000, and the assumption by the Texas and Pacific Railroad Company, as then called, of the floating debt of the Southern Pacific Railroad Company, not to exceed in amount the sum $700,000, and also the debt of said company due the State of Texas, not to exceed the sum of $250,000.

The above consideration had been paid and performed before the filing of any bill asserting a claim under the mortgages.

The bill charged that at the execution of the mortgages

the complainant was the president of the Southern Pacific Railroad Company, and that by virtue of the authority conferred by a by-law of the stockholders of the company upon the board of directors, and a resolution of the board of directors passed in pursuance of such by-law, he, as president of the company, executed the alleged mortgages, and that subsequently, on the first of September, 1861, the company ordered 350 of said construction bonds to be issued; that 200 of said bonds were sold and put in circulation by the company; and that of said 200 bonds the complainant is the owner for a valuable consideration of 148 bonds dated the first of September, 1860, and payable the first of January, 1883, each for the sum of $1,000, and with coupons for seven per cent. interest, payable on the first of January and July until the maturity of the bonds. Record, 7, 8, 9, 10, 11.

By the law of the State of Texas in force at the time of the mortgages, no railroad company had power to make any trust deed or mortgage on its franchises or property, unless the power was expressly given by the by-laws of the company; and to establish such by-laws required the vote of a two-thirds majority of the stock of the company.

The following is the enactment, being the fourth section of the act of December 19, 1857, above referred to. Pasch. Dig., p. 819, art. 4911:

"Every railroad company shall have the power to make such by-laws as they may think proper for the government of the company, the same not being inconsistent with the objects of its charter or the laws of the State, and in the enactment of such by-laws the stockholders shall be entitled to one vote for each share of stock held by them, and may vote in person or by written proxy. And it shall require a vote *of a majority of not less than two-thirds of the stock of the company to establish such by-laws; and no company shall have the power to make any trust deed or mortgage on the franchises or property of the company, unless the power is expressly given by the by-laws of the company.*"

The second section of the same law, Pasch. Dig., p. 819, art. 4909, provides as follows:

"Every railroad company heretofore incorporated, or which may hereafter be incorporated by the Legislature of this State, shall be required to keep its stock books at the principal office of the company on the line of its road, in which books shall be entered all certificates of the capital stock issued by said company, and all transfers of stock shall be entered in such books, which, at all reasonable business hours, shall be open to the inspection of each stockholder, and to any agent or officer of the State whose duty it may be to inspect such books; and all meetings of the directors of any railroad company for the transaction of business shall be held at the office of said company, as required to be kept by this section."

The by-law of the stockholders, as pretended, is as follows:

"OCTOBER 5, 1859.

"At a meeting of the stockholders, at which two-thirds of all the stock in the company was represented, the following resolution was adopted unanimously:

"Whereas the following by-law has been enacted, to wit:

"*Be it resolved*, and it is hereby enacted, by the stockholders of the Southern Pacific Railroad Company, a majority of not less than two-thirds of the company herein concurring, that the board of directors shall have the power and authority to execute mortgages, deeds of trust, and deeds of conveyance, in bargain and sale, of and upon franchise, chartered rights and charter, and the real and personal property now owned, equitably or legally, or hereinafter to be acquired, and all appurtenances and hereditaments thereunto belonging; all choses in action, the railroad and rolling stock now or hereafter acquired, of this company, either in whole or part, for the purpose of raising, obtaining, or negotiating or borrowing means or money to construct and aid in constructing our various works under the provisions of our charter, and the proper and usual operation of our railroad; the paying of freights, the paying of interest on construction bonds, or the paying of other liabilities and

accruing interest now or hereafter existing or created. And said mortgages, deeds of trust, and deeds of conveyance shall be recorded in the minutes of the board, and thereby become part and parcel of the resolutions of the board so authorizing the same."

The resolution of the board of directors, as pretended, is as follows:

"OCTOBER 5, 1859.

"At a meeting of the directors at which J. Fowlks, R. V. Richardson, R. W. Loughery, and W. T. Scott were present, J. C. Wilson by proxy, the following resolution was adopted unanimously:

"And whereas the following resolution has been adopted, to wit:

"*Be it resolved*, and it is hereby enacted, by the board of directors of the Southern Pacific Railroad Company, that the president is hereby authorized and empowered to execute at any place in the United States, under the seal of the company, countersigned by the secretary, a mortgage or deed of trust upon six millions of acres of land of the company donated by the State of Texas, and upon the entire line of the railroad of the company, commencing at the eastern line of the State of Texas, thence extending through the said State to the Rio Grande river, near the town of El Paso; also upon the rolling stock, stations, depot grounds and buildings, the franchises and chartered rights of the company, to secure certainly prompt payment of twenty-five millions of dollars of construction bonds issuable from time to time, as ordered by the board of directors, and payable on the first day of January, A. D. 1885, in the city of New York, bearing interest at the rate of seven per centum per annum, payable on the first day of January and July of each year, represented by interest warrants or coupons executed as aforesaid and appended to each bond."

The above by-law and resolution are embodied in each mortgage. Record, pp. 29–41. They will also be found interpolated under date of October 5th, 1859, in the proceedings of the Richardson organization. Book No. 2, p. 6; Record, pp. 846, 847.

The original mortgages were never produced, although the fact of their execution was in issue. As they were alleged to have been made to the complainant and R. V. Richardson as joint trustees, (Record, page 89,) the latter of whom had died before the suit was brought, the complainant was legally chargeable with their possession.

The death of D. C. Wilder, the secretary of the company at the time the mortgages purport to have been executed, and who appears to have attested them, and the dark cloud of suspicion which, as will be seen hereafter, overhangs every part of the transaction of which the complainant seeks by his bill to take advantage, furnished most potential reasons for the production of the original mortgages.

The only evidence of them is a copy of the land record certified by the clerk of the District Court of Harrison county, Texas, *ex-officio* recorder of deeds. This copy, filed with the bill and marked "Exhibit B," and set out in the Record, pp. 29 to 45, shows by the N. B. appended to the record (Record, p. 44) that in the papers purporting to be the mortgages, and recorded as such, there were erasures and interlineations with ink and pencil. An examination of "Exhibit B" will show:

1. That the alleged mortgages purported to have been executed and acknowledged by the complainant as president of the Southern Pacific Railroad Company, and also by him and R. V. Richardson (since dead) as trustees, on the 10th of September, 1860, before a commissioner of the State of Texas, and attested on the same day by D. C. Wilder (since dead) as secretary. Record, pp. 41, 43, 44.

2. That each mortgage purports to set forth specifically and in terms the authority by which it was executed, such authority consisting of the alleged by-law of the stockholders and resolution of the board of directors above mentioned. Record, pp. 29, 30, 41.

3. That the first mortgage conveyed "all and singular the several pieces or parcels of land being the railway stations

and depots of the railroad of the said parties of the first part, *from the eastern to the western boundary line of the State of Texas*, and all and singular the stations and depot buildings and engine-houses and other improvements and erections thereon now made or hereafter to be made;" (Record, p. 32;) and also 9,375 sections of square miles of land, each section containing 640 acres, making in all 6,000,000 acres of land (Record, p. 33) in trust to secure $25,000,000 of construction bonds, to be issued from time to time, as ordered by the board of directors, said bonds to be in sums of $1,000 and $500, and to mature on the first of January, 1883, and to bear interest at seven per cent., payable on the first day of January and July until maturity; and that in addition to the enormous amount of property conveyed and debt contemplated, such mortgage invested the trustees with vast powers of administration and disposition of the land conveyed; (Record, pp. 34 to 38;) but that the second mortgage, (a mere bagatelle in comparison with the first,) conveyed only 1,000,000 acres of land, not included in the 6,000,000, as additional security for the prompt payment of the coupons or interest of the construction bonds, and empowered the trustees to sell and convey from time to time on the requisition of the company, in order to supply any deficiency of moneys from other sources to meet the coupons. Record, pp. 42, 43.

Of the millions of acres of land which the mortgages purport to convey, not an acre had been received by the company; nor was the company entitled to receive any land except as it should, from time to time, complete and put in running order twenty-five miles of its road. The completion of each twenty-five miles entitled it to sixteen sections of land for every mile so completed. Pasch. Dig., pp. 826, 827, arts. 4945, 4950.

A copy of the construction bonds claimed by the complainant will be found, (Record, p. 644,) and a copy of the resolution indorsed on the bonds, and dated the 1st of Sep-

tember, 1866, and authorizing the issue of 350 bonds. Record, p. 646.

This resolution appears, however, nowhere except on the back of the bond.

The bill charged that the bonds held by the complainant had been assumed by the Texas and Pacific Railway Company as part of the floating debt of $700,000, and had also been recognized in the annual reports made by the Southern Pacific Railroad Company, in pursuance of law, to the controller of public accounts of the State of Texas.

The bill disclaimed the right to a decree for the principal of the bonds, but claimed the coupons in arrear, none of which had been paid, and also interest on such coupons at the rate of seven per cent. The sum thus demanded for coupons and interest amounted to $150,000. Record, pp. 17, 20.

In addition to the above claim the complainant set up two others.

He alleged that to raise money for the company he, on the 15th of October, 1860, as president of the company, and relying upon the good faith of the company in ratifying his action, and upon the security of the mortgages, executed three notes in favor of Jeptha Fowlkes, of Memphis, Tennessee, payable six months after date, each for $10,000, and procured the indorsement of said Fowlkes upon said notes, and also indorsed his own name thereon, and paid over to the company the proceeds of said notes, which proceeds were accepted and used by the company; that the said notes were protested and paid by the complainant, and were in 1866 forwarded to Memphis, but were lost or destroyed on board a steamer on the Mississippi, which was sunk.

This demand was a simple contract debt for money lent and advanced, not having the remotest connection with the mortgages, except that the complainant avers he relied upon them. Record, pp. 17–19.

The amount of these notes with interest is $55,200. Record, p. 19.

The next item claimed in the bill is as follows:

The complainant avers that in 1860, 1861, 1862, and 1863, whilst president of the company, "believing that all such sums as might be advanced to it were secured by the mortgages aforesaid, and that said company would honor and make special effort to pay and refund the same with interest, your orator did, on the days and years aforesaid, advance to said company divers large sums of money, a part of which was the salary of your orator, and part thereof cash in large sums for the payment of freight, machinery, negotiating bonds, travelling expenses, and for other purposes."

The sums thus claimed to have been advanced exceeded, as alleged, $50,000, and are set out with interest in an itemized account, marked "Exhibit E." Record, p. 52.

To this bill the Texas and Pacific Railway Company answered on the 3d of September, 1873. Record, pp. 61 to 79.

The answer alleges that the defendant has no knowledge or information as to the alleged mortgages other than the allegations of the bill and the record of Harrison county, Texas.

It denies that the complainant was the president of the Southern Pacific Railroad Company, and avers that he was not a stockholder, and hence ineligible as a director or as president, and avers that if elected director or president such election was held out of the State, and was absolutely void. Record, p. 62.

It denies the alleged by-law authorizing the board of directors to execute said mortgages. Record, p. 63.

It denies the alleged resolution of the board of directors authorizing the president of the company to execute said mortgage. Record, p. 63.

It avers that the record-books of the Southern Pacific

Railroad Company show such by-law and resolution, but that the same are forgeries and were falsely and fraudulently interpolated in said record-books by the complainant, or by his procurement, for the purpose of giving color to the execution of the mortgages and with intent to cheat and defraud the stockholders and creditors of the company. Record, p. 63.

It avers that if the pretended mortgages, construction bonds, and interest coupons were ever executed, they were executed by said complainant, and Jeptha Fowlkes and R. V. Richardson, in pursuance of a fraudulent and corrupt combination between them, for their own benefit and to promote their own private speculations and interests, and with intent to defraud. Record, pp. 65, 66.

It denies that the Southern Pacific Railroad Company, or this defendant, ever received, directly or indirectly, from the complainant, or any other person, any sum or sums of money or other consideration as the proceeds of the pretended construction bonds. Record, p. 66.

It denies that the Southern Pacific Railroad Company ever resolved to issue 350 construction bonds; or ever uttered, sold, or put into circulation 200 of said construction bonds; (Record, p. 63;) and avers that if any construction bonds were ever uttered, sold, or put into circulation, it was done by the complainant and his confederates, and not by the authority or for the use and benefit of the Southern Pacific Railroad Company. Record, p. 63.

It denies that the complainant ever became the owner for a valuable consideration of 148 of said construction bonds, and avers that if he is the holder of such bonds, they were issued by himself and to himself without the authority of the company, and without any consideration moving from him to the company. Record, pp. 63, 64.

It makes the same denials in respect of the coupons. Record, p. 64.

It denies that any indebtedness to the complainant ever

entered into the floating debt of the Southern Pacific Railroad Company, assumed by the defendant. Record, p. 68.

It admits that the annual reports to the comptroller of public accounts were made by the Southern Pacific Railroad Company, as required by law, from 1859 to 1871 inclusive, and that the said annual reports showed the indebtedness of said company at their respective dates, but denies that any of the said reports recognized the construction bonds or any sort of indebtedness to the complainant, (Record, pp. 67, 68,) and files the reports marked "Exhibit F." Record, pp. 96 to 139.

It denies the alleged Fowlkes indebtedness, or that the same was incurred by authority of the company, or that the proceeds of the transaction were received by the company, or that the same was secured by the mortgages. It sets up the plea of the statute of limitations to such demand. Record, p. 66.

It denies the claim set up for salary and advances, or that the same were secured by the mortgages. To this claim also the answer makes the defense of the statute of limitations. Record, p. 67.

It further alleges that if the pretended mortgages, construction bonds, and coupons ever were valid claims against the Southern Pacific Railroad Company, they were cut off and defeated by the sale of the franchises and road of the company on the 3d of September, 1861, above mentioned.

It avers the recovery of judgments and levy of execution under one of them upon the road and franchises on the 9th of August, 1860, (before the alleged mortgage,) and under two others on the 3d of January, 1861, (before the recordation of the mortgages,) and the sale thereunder by due course of law, at which sale W. S. Fulkerson became the purchaser, and that the sheriff duly conveyed said franchises and road to said Fulkerson, in pursuance of said levies and purchase; that thereafter a new company was organized under the laws of Texas, to which company the

road and franchises were conveyed by said Fulkerson; that said new company held possession of the road and its franchises until the 5th of May, 1868, when the sale under executions above mentioned was made; and that said sale was followed on the 6th of October, 1868, by a sale under a decree of foreclosure of a mortgage for $150,000, and that the purchaser at these sales, R. B. Hall, and his associates organized a new company, and having consolidated with the company which had been formed in Louisiana on the sale of the 4th of April, 1868, of the leased portion of the road in that State, as above stated, held the road and franchises until they were purchased by the Texas and Pacific Railway Company.

The answer further avers that no claim for the payment of coupons or the other claims of the complainant was ever made to the Southern Pacific Railroad Company or against the Texas and Pacific Railway Company, and that no action or other proceeding was ever instituted to enforce the pretended mortgages until the filing of the present bill; and that, in the meantime, the defendant purchased in good faith and without notice, and has executed its contract of purchase and invested large sums of money in the road.

On the 3d of April, 1876, an amended bill was filed. Record, p. 146.

The complainant, by the original bill, claimed, as above stated, to be the owner of one hundred and forty-eight bonds, and in addition thereto set up a claim for money paid on his indorsement for the company, and another claim for salary and advances.

The statute of limitations was pleaded to both the latter claims.

By the amended bill he undertakes to explain his pretended ownership of the hundred and forty-eight bonds.

He entirely abandons the allegations of the original bill, to the effect that he held the bonds in addition to the claims barred by limitations, and avers that the manner in which

he acquired $100,000 of the bonds was that he claimed salary at the rate of $30,000 a year, and the board of directors, or the executive committee, consented to pay salary at the rate of $10,000 a year, and gave the $100,000 of bonds, "then almost worthless in the market," as a "bonus." Record, p. 147.

The salary of the president of the company was fixed at $10,000 a year. Record, p. 850.

The other forty-eight bonds, the amended bill claims, were deposited with the claimant as collateral security when he indorsed the Fowlkes notes. Record, p. 148.

Further, the amended bill impeaches the sale of the 3d of September, 1861, on the ground of fraud and collusion between the purchaser, Fulkerson, and the vice-president and some of the directors and stockholders of the company, for the purpose of ridding the company of Northern stockholders and creditors.

There is, however, no attempt in any manner to connect with the alleged fraud and collusion the Texas and Pacific Railway Company, which bought in good faith and without notice more than ten years after the Fulkerson sale.

On the 22d of February, 1876, after the testimony had been taken, another amended bill was filed. Record, p. 184.

It alleges that the complainant did not obtain the $100,000 as a "bonus," as alleged, but in consideration of services performed and moneys advanced. Record, p. 186.

It also changes front in respect of the forty-eight bonds by alleging that they were given as collateral, not to the complainant, as alleged in the amended bill, but to Schuchard & Gebhard, bankers of New York, who discounted the Fowlkes notes, and that the agreement with said bankers was that one hundred bonds should be deposited as collateral, but that the company failed to deposit the other fifty-two, and that the complainant, on payment of the Fowlkes notes, became subrogated to the collateral.

The bill further assails the sales made as above mentioned in April and October, 1868, on the ground of fraud and collusion between the purchaser and some of the directors and officers of the then company.

Again, no attempt is made to connect the Texas and Pacific Railway Company with the alleged fraud and collusion.

The averments of the first and second amended bill were put in issue by the answers of the defendant. Record, pp. 156, 200.

The original bill was brought by the complainant in his own right against the Texas and Pacific Railway Company and certain parties who were the directors of the Southern Pacific Railroad Company on the 21st of March, 1872, when the latter company was merged in the former. Record, I.

By the law of Texas the directors of a sold-out company are made the trustees of the creditors and stockholders of such company, with authority to sue and be sued. Paschal's Dig., p. 820, art. 4916.

Neither the directors of the Richardson company, sold out on the 3d of September, 1861, nor of the Fulkerson company, sold out in April and October, 1868, are made parties, although those sales are impeached by the amended bills.

By the first amended bill the original bill was prayed to be considered a creditors' bill. Record, p. 165.

Petitions were filed on the same day, March 21, 1874, by J. D. Arundel, James H. Gillum, and George F. Flournoy, praying to be made parties. Record, pp. 173, 174, 176.

After the cause had been set for hearing, a fourth petition to be made a party was filed by R. W. Hyman on the 21st of September, 1876. Record, p. 873.

All these petitions adopt the pretensions of the complainant, but not one of the petitioners avers that he is a holder in good faith for value and without notice.

The above statement of the case is sufficient to show that the main issues involved were the validity of the mortgages as the act and deed of the company; the issue of the bonds by the authority of the company; whether, if there was fraud in the inception of the mortgages, the complainants were bound to prove that they were *bona-fide* purchasers for value and without notice, notwithstanding the bonds were negotiable, and whether they have proved the same; whether the sale of the 3d of September, 1861, passed title to the purchasers paramount to the mortgages; whether such title can be impeached after the lapse of nearly thirteen years as against a *bona-fide* purchaser for value and without notice; and whether, upon the whole case, there is such a want of conscience, good faith, and diligence on the part of the complainants as to deprive them of any relief at the hands of a court of equity.

The court below ruled that no authority existed for the execution of the mortgages and bonds; that the by-law claimed to have been passed by the stockholders on the 5th of October, 1859, was not made at any meeting of the same, and that the resolution claimed to have been passed on the same day by the directors was never in fact passed by them; and, therefore, that there was a want of power and authority for executing the mortgages and bonds, and hence that the same were null and void, as not being the act and deed of the company.

The court further ruled that what purports to be a resolution of the company indorsed upon the bonds was never passed at any meeting of the stockholders or directors thereof, and is void as not being the act of the company.

The court further ruled that, even assuming the resolution of the board of directors of the 5th of October, 1859, to be genuine, it authorized the execution of a mortgage to secure construction bonds issued from time to time "as ordered by the board of directors," and that no such resolution was ever passed by the board of directors as that

authorizing the issue of the three hundred and sixty-five construction bonds, as alleged in complainant's bill, or of any construction bonds whatever; and that there was an utter want of power on the part of those who issued the bonds sued on.

The court further held that the doctrine as declared by this court in Smith *v.* Sac County, 11 Wall., 139, was applicable to these cases—that evidence of fraud or illegality in the origin or inception of negotiable bonds and coupons will throw upon the holder the burden of showing that he gave a valuable consideration for them before maturity.

The learned judge says:

"Here is a case in which inspection of book No. 2 will satisfy any one, as it seems to me, that the entries made on pages 63 and 64 were made by some one falsely and fraudulently. No matter by whom it was done, I think that an inspection of the book itself, in connection with all the evidence in regard to the execution and issuance of the bonds, will throw such a cloud of suspicion around it as to require of all the parties suing in this case to show that they paid valuable consideration for the bonds and coupons sued on, and that they had no knowledge of any illegality attending their issue. This, in my judgment, has not been done by any of the complainants."

Points and Argument.

I.

The judicial sale of September 3, 1861, is a bar to the relief sought.

1. The mortgages bear date the 25th of August, 1860, (Record, pp. 30, 41,) and were acknowledged on the 10th of September, 1860, (Record, pp. 40, 42,) and not recorded until the 16th of March, 1861. Record, p. 44.

The judicial sale was made in pursuance of four levies, made under judgments rendered by the District Court of

Harrison county, in the State of Texas, against the Southern Pacific Railroad Company.

One of these levies was made on the 9th of August, 1860, (Record, p. 330,) before the date of the mortgages.

Two others were made on the 3d of January, 1861, (Record, pp. 321, 325)—after such date, but before the registration of the mortgages.

The deed of the sheriff to the purchaser, H. S. Fulkerson, dated the 3d of September, 1861, and recorded on the 13th of September, 1861, is set out. Record, p. 333, &c.

That this deed took precedence of any title under the mortgages, seems beyond the reach of controversy or cavil.

It is argued that the judgment under which the levy of the 9th of August, 1860, was made had been reduced by payments to a small amount.

The question here, however, is not one of amount, but title, and whether the balance was much or little, it cannot be denied that it was sufficient to authorize a levy and sale and vest title in the purchaser. Besides, by the law of Texas the two judgments levied before the registration of the mortgages precluded any title intended to be conveyed by the latter.

By that law judgments operate as a lien upon lands from their date, and executions operate as a lien upon the personal property from the day on which they issue. Pasch. Dig., art. 1286.

By another provision "all bargains, sales, and conveyances whatsoever of any lands, tenements, and hereditaments, whether they may be made for passing any estate, or freehold, or inheritance, or for a term of years, * * * and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as *to all creditors*, and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged and proved and lodged with the clerk to be recorded according to the directions of this act; but the same, as be-

tween the parties and their heirs, and as to all subsequent purchasers without notice thereof or without consideration, shall nevertheless be valid and binding." Paschal's Dig., art. 4988.

The statute again says:

"Every conveyance, compact, agreement, or deed of trust, or mortgage in this act mentioned, which shall be acknowledged, proved, or certified according to law, and delivered to the clerk of the proper court to be recorded, shall take effect and be valid as to all subsequent purchasers for a valuable consideration without notice, *and as to all creditors*, from the time when such instruments shall be so acknowledged, proved, or certified, and delivered to such clerk to be recorded, *and from that time only*." Paschal's Dig., art. 4994.

This language would appear to be too clear to admit of doubt. Conveyances were to take effect as to subsequent purchasers without notice, and as to all creditors from the time of recordation, "*and from that time only.*"

But was a purchaser at a judicial sale bound by a conveyance which, although made after judgment, and especially after levy, was not registered before a sale?

This question was, under the Texas decisions, involved in considerable doubt.

On the one hand, there was the rule of the common law, that an execution sale passed only the interest of the judgment debtor, and that a court of equity would uphold the equitable rights of third persons. Brown *v.* Pierce, 7 Wall., 205.

On the other hand were the clear language and policy of the registration acts.

The doubt which existed was probably the reason why the judge below expressed no opinion upon the point, but decided the case on other grounds.

The late case of Grace *v.* Wade, reported in 1877 in 45 Texas, p. 522, has authoritatively settled the question, after

an elaborate review of it, upon principle and authority, and has determined that, by the law of the State of Texas, a purchaser at a sheriff's sale, with notice of a conveyance recorded before the sale, but after judgment and levy, is not bound by such conveyance, but takes a title superior to it.

This decision of the court of last resort, in relation to a statute of the State, practically disposes of the present case. The court says: "The only question in this case is, whether a vendee of land, who claims title by an unrecorded deed or bond for title, or the purchaser with notice of such deed or bond at execution sale or judgment against the vendor, where the creditor has no notice of the title or claim of the vendee at the date of the levy of the execution, has the better title."

Again: "There appears to be, however, some uncertainty on the subject in the mind of the profession, as well as some confusion in regard to it in the later decisions of the court."

After stating the rule of the common law he says: "But the rights of the lien creditor, and of third parties claiming by unrecorded conveyances, are not to be determined with us by the common law, but by the statute changing and modifying, and, to some extent, at least, entirely abrogating the common-law rule in such cases."

After quoting the registration statutes above mentioned, the court says: "Now, if an unrecorded instrument cannot take effect, but is void as to creditors, it is absurd to say that a creditor's lien does not bind the land to which it applies, or that it cannot be enforced by the sale of the land so bound by it for the payment of the debt, just as if no such instrument existed; and it would be equally as absurd to say that a right acquired by the creditor by his lien, not merely to purchase himself, but to have the land sold in open market, when once secured can be taken away by the subsequent record of such instrument, or that the

party holding such lien can, by subsequent notice, be precluded from the full benefit of his lien for the satisfaction and discharge of his demand, except by becoming himself the purchaser."

2. By the first amended bill it is sought to ingraft a constructive trust upon the legal title conveyed in pursuance of the sale of September 3, 1861.

The judgments are not impeached, nor is the regularity of the proceedings under them, nor the legal validity of the sale; but it is charged that the sale was the result of a fraudulent combination between Fulkerson, the purchaser, and the vice-president and some of the directors and stockholders of the company for the purpose of getting rid of Northern stockholders and creditors, and on this ground it is claimed that the sale, conceded by the pleadings to be valid, should, in equity, be set aside. Record, pp. 149, &c., 928, &c.

If the charge was true, it would afford no ground for relief against the Texas and Pacific Railway Company.

The charge is that Fulkerson and his associates, nearly thirteen years before any complaint, committed a fraud upon the complainants.

Well, if the complainants were injured, why did they not proceed against the wrong-doers? What privity existed between Fulkerson and his associates and the Texas and Pacific Railway Company? Fulkerson and his associates many years since disappeared.

The company formed by them in 1861 ceased to exist in 1868. Then a new company was formed which existed for about four years, and then sold out to the present defendant.

Upon what principle is the latter to be held liable for the sins of Fulkerson and his associates?

There is an entire absence of averment or proof as to why this should be done, except upon the theory that if A hurts B, C ought to be held responsible.

The Texas and Pacific Railway Company was a *bona-fide* purchaser for value and without any notice of the pretended equity set up to assail a muniment of title. The contrary is neither averred nor proved. The company paid $3,000,000, and assumed the debt due the State of Texas and the floating debt. The charge in the original bill was that the floating debt included the construction bonds, and was emphatically denied by the answer. Record, pp. 22–68.

The only evidence on the subject is the deposition of Thomas A. Scott, (Record, p 808,) which fully sustains the answer.

It is argued that when the company purchased, the land records gave notice of the mortgages. That is true, but the court records gave notice of the levies before recordation of the mortgages, and of the sale under such levies, whereby the mortgages were precluded and cut off; and upon the faith that the title was as shown on the face of the court records, and in the utter absence of any notice of infirmity in a sale apparently good, the company bought.

Attention is called to the fact that the only notice in respect to which there is either averment or evidence is notice not of the latent equity relied on to set aside the sale, but of the fact that the complainant Smith claimed a number of bonds under the mortgages.

He says in his testimony (Record, p. 512) that he directed his attorney Rodman to give notice that he claimed some of the bonds, and Rodman says he sent such notice to Marshall O. Roberts, vice-president of the Southern Transcontinental Railroad Company, and Thomas A. Scott, president of the Southern Pacific Railroad Company. Record, pp. 624, 625. But the receipt of any such notice is denied by both Roberts and Scott; (Record, pp. 805, 591;) and, besides, the notice alleged to have been given related exclusively to the claim under the precluded mortgages, and had

not the remotest reference to the equity set up in avoidance of the sale. Record, pp. 624, 625.

But if Fulkerson and his associates had been sued, instead of the present defendant, the evidence would not support the charge of a combination to deprive Northern stockholders and creditors of their rights.

It may be remarked that such a charge comes with an ill grace from the complainant, who, at the time of the sale, was a citizen of the Confederate States and in their military service, and who boasted how, among other exploits, he, as quartermaster-general of the State of Tennessee, in a few months equipped and turned over to the Confederate States forty thousand men. Record, p. 565.

The principle declared by this court in *Jackson* v. *Ludeling*, 21 Wall., 616, is that if the directors, stockholders, or some of many creditors of a corporation holding a common security combine to bring about a sale of the corporate property at a sacrifice, and at such sale purchase the property, at an inadequate price, for their own benefit, such sale will be treated as fraudulent and set aside.

The essential element of the equity is the conbination among those holding fiduciary relations to a corporation to bring about a sale of its property at a sacrifice in order to become the purchasers of it.

The facts upon which such an equity rests do not exist in the present case.

Here the judgments were not owned or controlled by any of the parties charged. Fulkerson, the purchaser, was neither director nor stockholder Record, p. 740. There was no combination to effect a sale for any purpose. The evidence shows that the sale was inevitable, owing to the insolvency of the company, and hence that parties who had no agency in bringing about the sale united, as they had a right to do, in protection of their common interest.

Jackson *v.* Ludeling, 21 Wall., 616.

E. A. Blanche, a stockholder and engineer-in-chief of the company, testifies (Record, p. 853): "The sale was made as a matter of necessity. There were judgments against the road which had been put in execution, and which the company were unable to pay. The enforcement of these executions had been twice postponed, or oftener perhaps. There were other judgments against the road that had not been put into execution, and there were numberless debts that were liable at any time to be put into execution, and the company had no means of meeting their obligations."

"Dr. Jeptha Fowlkes, financial agent at that meeting—that is, the meeting in Memphis—promised to have $20,000 in the city of Marshall previous to the sale day for the purchase of the road." Record, p. 253, 254.

"I know nothing about any such collusion for that purpose, or agreement or understanding to sell. The sale took place because it could not be prevented for any considerable length of time. The company was largely in debt, and had no means of paying them to an extent sufficient to prevent the sale. Stockholders would not respond to calls for assessments on their stock, and the earnings of the road were not sufficient to pay the expense of its officers." Record, p. 254.

"None of the executions under which the sale of the 3d of September, 1861, was made, were controlled or owned by the company or any of its officers or agents." Record, p. 255.

"The sale of the road under the executions under which it had been sold on the 3d of September, 1861, had been advertised for two preceding sale days, of which fact the president of the road and officers of the road, and especially the financial agent, J. Fowlkes, were duly advised. The financial agent of the company had used his best efforts to procure money to relieve the necessities of the company. I do not believe that, in the condition of the company then, it would have been possible to secure the money by loan

from any who knew of its condition to pay for the executions that had been levied on the property of the company." Record, 258.

Speaking of the meeting which had been held by some of the officers and other friends of the road in August, 1861, the same witness says: "The conclusion arrived at by those parties and at that time was a determination to give the best direction to the event which they saw was inevitable." Record, p. 267.

John M. Waskom, complainant witness, a director, says, page 236: "The sale of the road of the 3d of September, 1861, was not brought about for the purpose of cutting off or defrauding Northern creditors or stockholders, or any one else. I do not believe the sale of the road of the 5th of May, 1868, was brought about for the purpose of defrauding any one, or that there was any collusion or fraudulent agreement to cut off or defraud any one by means of such sale."

W. T. Scott, complainant witness, the vice-president and director, says, page 242: "The sale of the road was made September 3, 1861, because there were several executions pressing upon the road, and as the company had no funds, it was compelled to be sold to pay those executions. The sale had been previously postponed because hopes had been held out by Dr. Fowlkes and assurances given by him that money would be raised through Stevenson to pay the executions, and it would be held at a specified time, and the money not coming according to Fowlkes's assurances, the sale became a necessity."

R. W. Loughery, a director, says (Record, p. 280): "I cannot tell the financial condition of the company, but I know that from the year 1859 to 1868 it was embarrassed to provide for current expenses, and that it had frequently to borrow money. On one occasion W. T. Scott and I each loaned the company $100 to prevent the stoppage of the trains of the company."

H. S. Fulkerson, complainant's witness, who was neither a stockholder nor director, testifies (Record, p. 740) as follows:

"It was understood and agreed between myself and the officers of the company that I should form a new company immediately after making the purchase, by which any of the old stockholders should be admitted into the new company upon the payment of one dollar per share upon the stock held by them in the old company."

"I do not know who was interested in the executions." "I think it was unable at the time to meet and pay the executions." Record, p. 748.

James Turner, a witness for complainant, says (p. 218): "The sale of the road was twice postponed on the representations that the executions would be paid. On the 3d of September the financial condition of the road was exceedingly bad. There was a great want of confidence in the ability of the road to pay its debts, and if it had any money, I never saw any of it."

There is not a particle of evidence tending to show any combination to bring about a sale of the road at a sacrifice.

A very important fact in this case is that, as early as 1860, Stevenson, who is now complaining of the sale, knew of the judgments against the road, and of the possibility of a sale under them. Record, p. 563.

On April 17, 1861, and April 28, 1861, we find Fowlkes writing to the complainant about the judgments and pointing out the danger from them. Record, pp. 659, 660.

In Jackson *v.* Ludeling the relief was granted to parties against a sale made without their knowledge.

II.

Staleness and Acquiescence.

This defense meets the complainants *in limine.*

If the sale of the 3d of September, 1861, was originally subject to any equity on the part of the complainants, the right to assert such equity has been lost by lapse of time and acquiescence.

The amended bill, which first set up a constructive trust, was filed on the 3d of April, 1874, nearly thirteen years after the sale.

The above defense was taken by the defendant in its answer. Record, pp. 160, 169.

After such delay it is incumbent upon a party who seeks relief in equity to "set forth in his bill specifically what were the impediments to an earlier prosecution of the claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to the knowledge of the matter alleged in his bill."

Badger *v.* Badger, 2 Wall., 95.
Harwood *v.* R. R. Co., 17 Wall., 79.
Marsh *v.* Whitmore, 21 Wall., 178.
Twinlick Oil Co. *v.* Marbury, 91 U. S., 587.
Sullivan *v.* Portland and Kennebec R. R. Co., 94 U. S., 806.
Haywood *v.* National B'k, 96 U. S., 618.

The case of Harwood *v.* R. R. Co. is directly in point.

That was a bill to set aside a judicial sale on the ground of fraud and collusion between the trustee in a second mortgage and certain parties who were lessees of a railroad, whereby the conspirators, as was alleged, purchased the railroad for $2,500, when it was worth the sum of $2,000,000 over and above the first mortgage. Five years had

elapsed between the sale and the bringing of the suit. There was some explanation of the delay.

The court said: "We are of the opinion that there has been too great delay in initiating this suit, and that no sufficient excuse is given for it. The sale was made five years before the commencement of this suit, and it is fairly to be presumed from the bill that complainants were aware of the proceedings and after-progress. Their knowledge of the mortgage sale is expressly admitted. The allegation of ignorance is in general terms of the fraudulent acts and arrangements. They do not allege when they acquired knowledge, and do not give satisfactory reason why it was not sooner obtained.

"For aught that appears, they have slept upon their knowledge for several years. Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat recovery must depend upon the particular circumstances of each case. This case does not show sufficient degree of diligence to justify the overthrow of a decree of foreclosure UNDER WHICH NEW RIGHTS AND INTERESTS MUST NECESSARILY HAVE ARISEN."

It will hardly be credited that in the present cases no attempt even was made to explain the delay. The bills and petitions are absolutely silent upon the subject.

What changes took place within the long interval between the sale and suit brought? Some of the more prominent will be briefly adverted to.

We know that upon the sale a new company was organized and new stock issued. This company continued for about seven years, when it was sold out; and still another company was formed and new stock issued in 1868, which company lasted for about four years, when it was sold to the Texas and Pacific Railway Company. Neither the pleadings nor evidence afford information as to what became of the interest of Fulkerson and his associates, the

alleged wrong-doers. Their interest, if retained, ceased to exist after the sale of 1868. During the lives of the companies of 1861 and 1868 rights and interests were continually dropping out and new rights and interests continually arising. In other words, the stock was the subject of purchase and sale and other transactions.

The Southern Pacific sold to the Texas and Pacific on the 21st of March, 1872. Record, pp. 6, 28.

Before such consolidation took effect the consent of Congress and the State of Texas was necessary. This consent was obtained by legislative acts of the respective governments, passed on the 3d of March, 1871, and the 25th of May, 1871. Record, pp. 4, 5.

By the act of Congress the indebtedness or legal obligations of the Southern Pacific were to be assumed by the Texas and Pacific, *as might be agreed on*, and the consolidation was not to impair any lien which might exist on the railroad purchased, but the Texas and Pacific was not to assume debts or obligations to a greater amount than the cash value of the assets received.

The consideration of the deed or conveyance from the Southern Pacific to the Texas and Pacific was $3,000,000 in land-grant bonds, and the assumption of the floating debt of the former company and the debt due the State of Texas, not exceeding $250,000, making the consideration $3,950,000.

This arrangement was made without any notice of any equity affecting the judicial sale. Dep. Thomas A. Scott, Record, pp. 803–805.

Will it be pretended that the right to file a bill to set aside the sale was a lien protected by the act of Congress?

When the mortgages were executed and the sale was made in 1861 the company was hopelessly insolvent. The condition of the road was beyond description.

Hynson, a witness for the complainant, and superintendent for the road, says that in April, 1861, he reported to

Stevenson "the condition of the road, the number of warehouses that had been built, and the running of the 'bull-gine' train, which was a train pulled by oxen; we ran the 'bull-gine' train about six weeks; it ran from Swanson's Landing to within about a mile and a half of Marshall, a distance of about twenty-five miles; the reason we ran the train with oxen was because we had but one old locomotive, and had broken the axle of the driving-wheel in Swanson's field." Record, p. 216.

Again (Record, p. 217): "I don't know how much stock I owned in the company up to September, 1861; I traded for it—sometimes with an old horse and sometimes with an old wagon—but don't remember how much I paid for it or how much I sold it for; I just traded for it promiscuously."

Such was the extent and condition of the road of an insolvent company which had executed a mortgage for $25,000,000 in bonds to be issued.

See further, as to insolvency and the state of the road in 1861, the same witness, Record, p. 217; deposition James Turner, Record, p. 226; deposition J. M. Waskom, Record, p. 234; deposition Thomas A. Scott, Record, p. 243; deposition E. A. Blanche, Record, pp. 256–266.

The company formed in 1861 was in as bad a plight in 1868 as its predecessor in 1861.

James Turner, another witness for the complainant, says (Record, p. 227):

"In May, 1868, the road from Marshall to Shrevesport was in a wretched condition. There was on the line three locomotives, only two of which could be run at all. These were in a bad fix. A good many of the flues had been burnt out, and the pumps on neither of them would work. Frequently they would have to stop on the road and let the engines cool, and fill them with buckets. Neither of these engines, in their then fix, would pull three old cars over the road. The road, on the 5th of May, 1868, was hopelessly insolvent; could not pay its attorney's fees.

They could not buy ordinary supplies from the merchants in this town without the officer making the purchase would become personally responsible for it. I purchased in 1861 or 1868 some forty or fifty or sixty shares of that stock, which I thought so little of that I never had it transferred to my name on the books."

See also deposition J. M. Waskom, Record, p. 235; deposition W. T. Scott, Record, p. 243.

It is admitted by counsel that from the purchase of the road to July, 1875, the Texas and Pacific Railway Company had built 261 miles of road. Record, p. 228.

Stevenson, pretending as he does that he was the president of the Southern Pacific in 1861, is presumed to have known of the sale of the road.

We are not left, however, to presumption. He says, in his testimony, (Record, p. 554,) that he heard in April, 1862, of the sale of the road, and hence made no charge against the company for his salary after that time. See his account. Record, p. 53.

In fact, he knew of the sale at a much earlier date.

In his eagerness to show that he was treated as president, he filed a mass of papers. Record, p. 563.

Among these is a letter or circular from J. S. Holman, the president, under the organization formed immediately after the sale, dated New Orleans, October 1, 1861, informing him (Stevenson) of the sale of the road on the 3d of September, 1861, and the terms upon which he would be admitted. See "Exhibit Z Z," Record, p. 679.

The residence of Stevenson was at Nashville, Tennessee. Record, p. 569.

He was then engaged as chief quartermaster in the Confederate States army of the west. Record, pp. 565, 566, 581.

The residence of the complainant Smith was in Lexington, Kentucky. Record, p. 503.

At the time of the sale he pretends to have held $100,000 given him for salary. Record, p. 551.

As trustee under the mortgages, he had most important trusts and duties to discharge, if the sale was invalid. Towards the discharge of those duties he never took the first step.

The other complainant, William H. Smith, was also examined as a witness, (Record, p. 478,) and swears that early in September, 1861, he heard from Holman of the sale. He recognized the new company, and helped to form it, and entered into contract relations with it, as he testifies. Record, pp. 482, 483.

The amended bill of this complainant, like that of Stevenson, is utterly devoid of any explanation of laches.

Neither of the complainants pretends to have been ignorant of the formation of the company of 1861, nor to have demanded payment of the coupons, which matured semi-annually, nor, indeed, to have asserted any claim under the mortgages until the pretended notice alleged to have been sent by the attorney of Smith.

The petitioning creditors, J. D. Arundel, James H. Gillum, and George F. Flournoy, by their petitions filed in the Stevenson case March 21, 1874, (Record, pp. 173, 174, 176,) simply adopt the original bill of Stevenson, and do not attempt any explanation of laches. The same may be said of R. W. Hyman, whose petition was filed September 21, 1876, after the cause was at issue. Record, pp. 873, 874.

Thus lapse of time; the failure to connect in any manner the alleged wrong-doers with the present defendant; the fact that the company organized after the sale has long since ceased to exist; the fact that its successor has sold out to an innocent party, the present defendant; the change in the condition of the road from insolvency to affluence; the knowledge of the sale, admitted by the parties; the conduct of the complainants until the filing of the bills,

and the absence of any attempt to explain the delay, combine to render the doctrine of laches specially applicable.

The doctrine of this court is, that the explanation of laches shall be alleged and proved. Such allegation is as necessary as any other entering into the relief prayed for. Marsh *v.* Whitmore; Badger *v.* Badger, *supra.*

The necessity of doing something in the way of explanation seems to have been felt.

Although there is no allegation in explanation of delay, a most impotent effort was made by each complainant to assign some pretext for not bringing suit earlier. See Stevenson's testimony, Record, p. 567; see Smith's testimony, Record, p. 501.

In such a case as the present, not only will a court of equity refuse to attach to the legal title the constructive trust set up, but even if the defendant held no legal title, the complainants would, if they held or controlled the legal title, be estopped from setting it up against the defendant.

It is demonstrable that the complainants knew that the companies formed under the sale of 1861, and that of 1868, were expending their money in the improvement of the road. The complainants do not even pretend that they believed the operations of those companies were in subordination to the mortgages. The trusts did not show on their face that a single bond had even been issued. They were made to secure bonds to be issued from time to time.

The conduct of the complainants was such as to induce a reasonable belief that they had no claim. They remained silent when they should have spoken, and will not be heard now when they should be silent. They stood by and allowed others to expend millions in the improvement of the road. They allowed the Texas and Pacific to close its bargain for the purchase from the Southern Pacific, of which they do not pretend to have been ignorant, and said not one word in assertion of the claims now made.

In McKnight *v.* Taylor, 1 How., 168, Chief Justice Taney, in delivering the opinion of the court, says as follows:

"We do not found our judgment upon the presumption of payment. For it is not merely on the presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence to call into action the powers of the court."

In that case a bill was filed by a trustee to enforce a trust within twenty years from the date of the deed. The same doctrine was applied in Godden *v.* Kimball, 99 U. S., 201, where creditors sought after a lapse of fourteen years to enforce a deed of assignment for their benefit.

In those two cases the defense was lapse of time solely.

In the present, not only is there that element, but superadded to it an effort to make this court the instrument of injustice and fraud.

III.

1. There was no authority for the execution of the mortgages. Such authority, by the law of Texas above quoted, page 6, could only be given by the stockholders and by a majority of two-thirds of stock.

Of course the stockholders could grant the power subject to such conditions and limitations as to them might appear reasonable and proper.

The authority is here claimed by virtue of a by-law passed by the stockholders on the 5th of October, 1859, and of a resolution passed by the board of directors on the same day, set out in the bill. Record, pp. 7, 8.

To sustain the mortgages two facts must be made out: first, the grant of power to the board of directors, and secondly, the execution by the board of such power. Neither of these postulates is made out.

The answer avers that the alleged by-law and resolution are forgeries fraudulently interpolated in the minutes of the company. Record, p. 63.

The court below found as matter of fact that the said by-law and resolution had never been passed.

The value of entries upon the books of a corporation, as evidence of its acts, depends upon such entries being made in a regular and orderly manner.

The entries of the by-law and resolution are made on two leaves left blank between the meeting of the stockholders under the Richardson purchase, held on the 3d of October, 1859, and the meeting of the board of directors appointed by the stockholders, held on the same day.

Then follow in the book the entries of a meeting of the board, held on the 8th of October, 1859, and another meeting of the board held on the 24th of November, 1859.

Then follow the entries of a meeting purporting to have been held on the 6th of August, 1860.

At the meeting of the stockholders on the 3d of October, 1859, a full code of by-laws was adopted. This meeting was evidently intended to be a thorough and complete organization of the company, and adjourned *sine die*. Record, p. 846. One of the by-laws provides for annual meetings of the stockholders, but no provision is made for any special meeting. Record, p. 838.

An inspection of Book No. 2 in the clerk's office will show that the proceedings of the stockholders' meeting begin at page 45 and end on page 62, and the proceedings of the directors' meeting on page 65, and extend to page 76.

The proceedings of the former meeting are signed by W. T. Scott, chairman, and D. C. Wilder, secretary; and those of the latter by D. C. Wilder, secretary.

On pages 63 and 64 are the disputed entries, sandwiched between the two meetings of the 3d of October, 1859.

These entries are signed by J. Fowlkes, chairman, and J.

Fowlkes, president, but not authenticated by the signature of the secretary.

They do not set forth the place where the meetings were held.

The body of those entries is in an unknown handwriting, which no witness has been able to identify; but the date, "October 5, 1859"; the signature to each entry, "J. Fowlkes, chairman"; the word "secretary" appended to each, and the word "unanimously" in the by-law, are shown to be in the handwriting of Jeptha Fowlkes.

Not a single witness gave evidence tending in the remotest manner to show that either meeting, set forth in the disputed entries, was held.

A. T. Smith, who was the clerk of the company from the 1st of October, 1858, to the 6th of September, 1861, being shown the minutes of the meetings of October 3d, 1859, in Book No. 2, says, Record, p. 274:

"I copied the proceedings of those meetings from page 45 to page 62 inclusive, and portion of page 65 from proceedings and papers handed to me by some officer of the company, but I don't know which one. Upon inspection of pages 63 and 64 of Book No. 2, above alluded to, I am unable to state by whom the main portion on each of those pages was written. I do know who wrote the words 'October 5th, 1859,' at the top of page 63, and the word 'unanimously' on the fourth line of said page, and the words at the bottom of said page 63, 'sec'y' and J. Fowlkes, chairman,' and also the words on the top of page 64, 'October 5, 1859,' and also on the fourth line from the top of said page 64 the word 'unanimously,' and at the bottom of said page 64 the word 'sec'y,' and the words 'J. Fowlkes, Pres.'

"These words above referred to were written by J. Fowlkes, and I am acquainted with his handwriting; I am acquainted with the handwriting of D. C. Wilder, and somewhat acquainted with the handwriting of Thomas Twitty. I don't know who wrote the entries on pages 63 and 64 other than what I have already specified above. I knew nothing of the meetings made on pages 63 and 64 of Book No. 2."

R. W. Loughery, a stockholder from 1859 to 1868 inclusive, and a director from 1859 to 1864 inclusive, says:

"I knew nothing whatever, and never heard until complainant's bill of complaint was read to me, of such by-laws as are charged in said complainant's bill of complaint to have been enacted by said Southern Pacific Railroad Company. I say further, that I do not remember, either as stockholder or director, any such proceedings as appear on pages 63 and 64 of book No. 2. I don't recollect any such proceedings either by the stockholders or directors of the Southern Pacific Railroad Company. I don't know the handwriting of the body of the proceedings on those pages. * * * While I was stockholder and director, as aforesaid, I never heard of any such construction bonds as are sued on in this case. I never heard of them until I saw the plaintiff's bill." Record, p. 279.

E. A. Blanche, chief engineer of the company in 1859 and 1860, and also stockholder, says, Record, p. 255:

"I have seen Jeptha Fowlkes's writing, and have received a great many letters from him; I am acquainted with his handwriting; I don't know in whose handwriting the body of the resolution on pages 63 and 64 are in. The words 'October 5th, 1859,' at page 63, top of said page, and the word 'unanimously' on the same page on the fourth line from the top; word 'sec'y,' and the words 'J. Fowlkes, chairman,' at the bottom of page 63, are in the handwriting of J. Fowlkes, and also on page 64, at the top of 64, the words 'October 5th, 1859,' and the word 'unanimously' the last, and on the fourth line from the top of said page, and the word 'sec'y,' and the words 'J. Fowlkes, pres.,' at the bottom of page 64, are in the handwriting of said Fowlkes. The pages referred to above—63 and 64—are those pages in Book No. 2 of the records of the Southern Pacific Railroad Company now here shown to me. I was chief engineer of the road in 1859 and 1860. The legal domicil of the company was at that time at Marshall. The board of directors met here. Sometimes I was at their meetings, but frequently not, as I was not a director. I was a stockholder in the company. I have no knowledge of a meeting of the stockholders purporting to have been held on the 5th of

October, 1859, the proceedings of which are found on page 63 of Book No. 2. I was not present at it. I was the owner of 240 shares of stock at the time, and I have no recollection of being represented at any such meeting. Nobody held my proxy at that time. I always made it my business to attend stockholders' meetings when I knew of them, and when it was practical. I never gave a proxy but for one meeting, and that was not the meeting referred to above. I never heard of the mortgages upon which this suit was brought until about the year 1872. I heard of the construction bonds which are embraced in this suit about the same time I heard of the mortgage."

See also dep. of W. T. Scott, chairman of stockholders' meeting of October 3, 1859, and director. Record, p. 244.

J. M. Waskom, a stockholder and witness of complainants, says, (Record, p. 236,) in reference to the Stevenson bonds: "Some time between 1861 and 1865, at some meeting of the board of directors, I first heard of the bonds referred to. It was stated in the board of directors that Dr. Fowlkes had issued the bonds to Stevenson; it was considered without authority, and we laughed over it; I don't know how many times we laughed over it; I don't know who made the statement; I can't tell whether it was a director or not, or an official of the road who made the statement; some one at the meeting made it."

See also dep. of James Turner, Record, p. 227.

Dep. of Jason C. Wilson, Record, pp. 774, 775.

Is it not incredible that when the policy of the company had been definitely fixed by the stockholders' meeting of October 3, 1859, it should be two days afterwards overturned by another meeting? Is it not incredible that if the latter meeting, involving the grant of all the property in every shape the company held, or ever hoped to hold, to secure $25,000,000, some one would not recollect it? Is it not incredible that if the disputed entries were made in the

little town of Marshall, Texas, the handwriting could not be readily identified?

Whilst it was easy for the complainants to establish affirmatively the fact that a meeting was held, not a particle of evidence was adduced to that effect. But this is not all. If the court will examine the by-law on page 63 of book No. 2 it will be seen that the figure "5" in "1859" was originally a "6," and the "9" also appears to have been made an "0." The change of the "6" to a "5" is apparent. Thus the year has been changed from "1860" to "1859."

A party making an entry in 1859 could not possibly make the mistake of writing instead of that year 1860. But the converse is not true. A party making the entry in the year 1860 might very naturally write that year instead of 1859.

Hence the probability that this entry was made in the year 1860, and not in 1859, and that the party discovering that he had entered the year 1860 at once corrected the mistake.

But who had a motive in 1860 to interpolate this entry? This question is set at rest by the testimony of Stevenson himself. At pages 105 to 116, inclusive, will be found the minutes of a meeting of the board of directors held on the 6th of August, 1860. See also Record, 853.

At this meeting Stevenson purports to have been appointed president of the company, (Record, 856,) and also elected a director. Record, 858. This meeting, though entered in the minutes as having been held at Marshall, was unquestionably held at the Fifth Avenue Hotel in the city of New York.

Stevenson (Record, 537) is interrogated, on the 26th of August, 1875, as to where he was elected president of the company, and says:

"My recollection is that it was at the Fifth Avenue Hotel in New York, and that Jeptha Fowlkes, general

financial agent of the road, Sam. Tate, General R. V. Richardson, and one or two others, I don't recollect their names. I think I had never seen these others before. These persons present composed the executive committee, *and I think a majority of the board of directors.* D. C. Wilder, the treasurer of the company, was there acting as secretary and treasurer—I think he was secretary and treasurer. This was, I think, in the early part of August—*about the 5th or 6th of August,* 1860. My impression is that I was present at this meeting, but I may be mistaken; I will correct it when I find a certain letter which will assist my recollection, if I find it needs correction."

[The witness never made any correction.]

He proceeds:

"At the same meeting that I was elected president I was also made a director, I think; that is my recollection. I have not had access to the books since 1861.

"Mr. Wilder produced at the meeting referred to the minute book and other books I think; he brought all the books that were necessary, and it turned out that he had brought all that were necessary, also the seal of the company."

On cross-examination, on the 1st of September, 1875, he says, Record, 570–1:

"I think that I was present when I was elected president. This election took place, I think, at the Fifth Avenue Hotel in New York; it was in my private room, I think. Fowlkes's room adjoined mine or was close by. Certainly Dr. Fowlkes, R. V. Richardson, and Wilder were present, and I think Tate and some other man was present; am not certain that Tate or the other man, one or both, were present. Do not recollect who presided at that meeting; my impression is that a written record of the meeting was kept. Mr. Wilder was there with the books with the object of keeping the records."

Again (Record, 571):

"I do not know where the local domicil of the Southern Pacific Railroad was at that time. I understood that the

board and stockholders had authority to meet anywhere in the United States that they thought necessary. Marshall, Texas, was the general headquarters of the company."

Again he says (Record, 574):

"In every meeting of the board of directors we had a full meeting in Dr. Fowlkes himself, who had the proxies of other directors, as I was advised at the time. If the full board was seven, as I believed it was and now believe it was, when I accepted the presidency, there was a quorum present when I was elected, and I presided often afterwards in New York under the same circumstances, *for we met nearly every night.* We met at Louisville. At the meeting in New York there was present Dr. Fowlkes, Richardson, and myself, and one or two others; I don't remember who they were. I think Tate was present. Said meetings were held in New York, I think at the Fifth Avenue Hotel, at the time I was elected president, and following nights for several meetings. In speaking of meetings, I assume where there was no more than two of us present—that is, Fowlkes and myself—that Dr. Fowlkes and his proxies made a legal quorum, but no instance that I recollect of that so few were present."

Again (same page):

"By way of explanation, I would say that Dr. Fowlkes was in the habit of holding meetings wherever he thought the interest of the company required it, having in himself, with his proxies, a quorum of the board, in consequence of which I was not impressed with the fact of other directors being present, as I would have been had their presence been necessary.

"Do not know that any record of the proceedings of these meetings to which I have referred being kept, except those of the meetings at which I was elected president, *I having had the minutes of that meeting read to me by Mr. Wilder, the secretary, to see if it was all right.*

"The records of the company were in the hands of the secretary, and only read from time to time when called for at the meetings of the board when Wilder was present. I do not recollect whether or not I signed the minutes of this meeting at which I was elected president, nor of those of

any other meeting. I have no doubt that Wilder kept proper records of the meetings whenever he was present, but do not recollect. He was present at several of the meetings held in New York and elsewhere; think he was present at some of the meetings at New Orleans or Louisville, but am not sure. Wilder is now dead. I made every effort to get at his set of books, but failed. I understood that *he kept a set of books from which he transferred to the books at Marshall through his assistant there.* At those meetings referred to, at which Wilder was not present, Fowlkes professed to take a memorandum of the proceedings where he thought it was necessary. *I never was in Marshall, Texas.*"

It is thus clear that the meeting of the 6th of August, 1860, at which Stevenson was appointed president, was held at the Fifth Avenue Hotel, in the city of New York, where the books and seal of the company then were, and that Stevenson and others held nightly meetings at the same place.

Tate was not a director.

No executive committee was ever appointed until at the meeting of the 6th of August, 1860.

As to the fact that the meeting of the 6th of August, 1860, was not held at Marshall, see dep. of R. W. Loughery, Record, p. 280; dep. of J. C. Wilson, Record, pp. 775, 776; dep. of W. T. Scott, Record, p. 244; dep. of C. E. Hynson, Record, p. 216.

That R. W. Loughery and Jason C. Wilson were never present at any meeting at which Stevenson was elected president or director, see their depositions. Record, pp. 280, 775.

Hence there could not have been a quorum of the board at the meeting in New York.

An examination of the proceedings of the meeting of the 6th of August, 1860, which Stevenson says were read over to him, will show that they are in execution of a vast

scheme of plunder which had been concocted in New York by Stevenson, Fowlkes, and Richardson.

This scheme finds expression in the mortgages in question. It consisted in incumbering the road and its property and future possible acquisitions with a debt of $25,000,000, and in transferring the governing power from the board of directors to an executive committee consisting of five, of which Stevenson, Fowlkes, and Richardson, the conspirators, were members. Record, p. 857.

The scheme was a fraud upon the State of Texas, the public, and the company.

By the law of Texas above quoted, the meeting of the 6th of August, 1860, held in New York, was absolutely void in respect of parties having notice of the illegality; certainly as to a party who pretends to have been the president of the company.

Galveston R. R. *v.* Cowdrey, 11 Wall., 459.

The above law of Texas was enacted after the execution of the mortgage before this court in Galveston R. R. *v.* Cowdrey.

The court, in that case, passed upon the power of a corporation at common law, and not under a mandatory statute.

From the time of the above meeting to September 3d, 1861, when the company was sold out, there appear to have been but two meetings. Record, p. 859.

The reason of this is, doubtless, that the bonds had passed into the possession of the so-called executive committee, who disposed of them, in their discretion, for their own purposes and without any regard to the action of the board.

If the above scheme of fraud, as developed in the so-called meeting of the 6th of August, 1860, and the mortgages be borne in mind, there will be no difficulty in de-

termining why the by-law and resolution of the 5th of October, 1859, were interpolated.

By the 14th by-law, adopted at the stockholders' meeting of the 3d of October, 1859, power was given to the board of directors to make any trust deed or mortgage on the franchise or property of the company for the purpose of borrowing money *to construct the works*, upon the recommendation in writing of the president and finance committee.

This power, it will be observed, was limited to the property of the company and to the purpose of constructing the works of the road, and required the recommendation in writing of the president and finance committee.

It did not embrace future acquisitions under the land grant of the State of Texas, nor the borrowing of money for other purposes than the single one of constructing the works of the company. It certainly did not embrace the payment of claims present or future, except for construction.

Stevenson claimed to be a large creditor of the company, and his claim was in no sense a debt for constructing works.

Hence the necessity of a larger power. Hence the by-law and resolution of October 5th, 1859.

Compare the by-law of October 3d, 1859, (Record, p. 838,) with that of October 5th, 1859. Record, p. 846.

Certainly larger power was *deemed* necessary, or the latter by-law would not have been interpolated.

The by-law and resolution of October 5th, 1859, were, therefore, interpolated in New York, where the books then were, as Stevenson himself declares.

This is the reason why the body of them is in an unknown handwriting, and why no one has identified such handwriting.

This is the reason why advantage was taken of the blank leaves between the two meetings of October 3d, 1859, in order to bring the by-law and resolution into proximity to

the proceedings of the 3d of October, 1859, and why such by-law and resolution were dated the 5th of October, 1859.

This is the reason why the year 1860 in the by-law, as originally written, was changed to 1859.

This is the reason why Fowlkes, who well knew the law of Texas as to the vote of stockholders necessary to give power, added the word "unanimously" in the by-law after it had been set out that two-thirds of all the stock was present.

As to the reason why D. C. Wilder did not sign the by-law and resolution of October 5, 1859, perhaps he was too honest, or perhaps his absence or some other cause prevented the intention of the conspirators that he should sign being carried into effect.

The mortgages derived no support from the by-law of the 3d of October, 1859. They are not alleged to have been made in pursuance of such by-law, and do not purport to have been so made. There was no recommendation in writing of the president and finance committee. Indeed, there was no finance committee at any time. That by-law gave no power to mortgage the land grant; neither did it give power to mortgage in order to meet the liabilities of the company except for constructing works.

2. Even if the by-law of October 5, 1859, was genuine, the mortgages were not executed in conformity with it.

The by-law required that they *should be recorded in the minutes of the board, and thereby become part and parcel of the resolutions of the board so authorizing the same.*

This is a limitation upon the grant of power which the stockholders granting the power had a perfect right to impose. The purpose was that the mortgages should be deliberately approved by the board of directors. This was never done.

The only evidence tending to show, however remotely, that the mortgages were submitted to the board is the third

resolution at the illegal meeting held at the Fifth Avenue Hotel on the 6th of August, 1860. Record, p. 854.

That resolution approves generally the form of some mortgage—which mortgage does not appear—but at the same time declares as follows:

"The executive committee is authorized and empowered to modify, amend, and alter the mortgage before recording the same at discretion."

And again (Record, p. 857):

"*Resolve 20th.* That said executive committee shall revise, alter, or amend the financial policy, modify and change at discretion the mortgage presented to the company by J. Fowlkes and adopted by this board."

Now, the mortgages were not dated until the 25th of August, 1860, and not executed until the 10th of September, 1860.

The design of the by-law was, that the mortgages, as finally settled, should receive the sanction of the board.

Thus the conspirators blundered.

IV.

1. The Southern Pacific Railroad Company never authorized the issue of the bonds.

This fact has also been found by the court below.

By the resolution of the 5th of October, 1859, if genuine, the bonds were "issuable from time to time, as ordered by the board of directors."

The authority claimed for the issue of the bonds is a resolution of the 1st of September, 1860, indorsed upon them. Record, p. 646.

This resolution does not indicate whether it is the act of the stockholders or the board of directors.

Its language is: "Resolved by the Southern Pacific Railroad Company that, &c."

It is perfectly plain that such resolution was a forgery. No such resolution was ever adopted. There is not a particle of evidence tending to show that such a resolution was ever adopted. There is no entry in the minutes—no oral testimony—and the court below has found it was not adopted.

2. As in respect of the power to mortgage, the complainants are driven to take refuge in a grant of power different from that alleged and incorporated in the mortgages.

So in respect to the issue of the bonds, the resolution indorsed on the bonds is abandoned, and refuge is sought in a resolution purporting to have been passed at the pretended meeting of the 6th of August, 1860. Record, p. 854.

This meeting has already been discussed. Out of the mouth of Stevenson it has been shown to have been illegal, and the testimony of other witnesses shows that there could have been no quorum. Indeed, Stevenson does not himself assert that there was a quorum.

The indorsement upon the bonds of a forged resolution must have been made with the knowledge or connivance of Stevenson, who signed the bonds, and for the worst of purposes. He certainly cannot take advantage of the proceedings of the illegal meeting.

If the meeting was illegal he is charged by law and duty with notice of it. If the meeting was illegal there was no executive committee, and his sole pretense is, after the abandonment of the ground taken by the original bill, that he obtained the bonds from such executive committee.

V.

Even if the mortgages could be sustained under the by-law of October 3, 1859, and authority can be found for the issue of bonds, such bonds can obtain the benefit of the mortgage only so far as they are within the specific purpose for which by that by-law the mortgage was authorized to be made. That purpose is declared by the by-law to be "the borrowing money to construct the works."

The issue of bonds to Stevenson was a manifest diversion of them from the authorized purpose. This is true both as to the one hundred bonds which he says were given to him for salary, and as to the forty-eight bonds which he says he obtained as collateral security to the loan of Gebhard and Schuzhard.

Stevenson has given several accounts of the way in which he received the one hundred bonds. He says in the original bill that he became the owner of his bonds for valuable consideration in 1861, 1862, and 1863. Record, p. 10.

In his first amended bill (Record, p. 147) he says:

"The bonds of the company, to wit, said construction bonds, were almost worthless in the market, and they agreed to pay your orator, as president aforesaid, instead of $30,000, to pay him $10,000 salary and a bonus of $100,000 in said construction bonds of the company."

He alleges in second amended bill that they were given to him for services already performed for said company, both before and after he became president, and for moneys advanced to the company, and were delivered to him in June, 1861. Record, p. 186.

In his testimony (Record, 551) he says:

"The other one hundred bonds were handed to me by Dr. Fowlkes. I don't recollect the date; I can only give it. It was some time after I returned from France, in February, 1861, and several months thereafter, I think, Dr.

Fowlkes and other members of the board—Richardson, I know, and probably Tate—beset me again to take $100,000 of the bonds as a bonus, and $10,000 a year in place of $30,000 a year originally agreed to be given."

It thus appears from Stevenson's statements that there was a misappropriation of the construction bonds.

If there was authority in any one to issue bonds, there was no authority to issue them for a purpose other than that of construction, and no authority to apply them even to any other valid liability of the company.

It is averred by the defendant that Stevenson was not the president of the company, and that if he was he had no claim upon the company for 100 of its bonds, and that, therefore, he obtained the 100 bonds without consideration.

In the minutes of the meeting held on August 6, 1860, there is the entry (Record, 856):

"*Resolve 9th*, That Vernon K. Stevenson, of Nashville, Tennessee, be, and he is hereby, appointed president of this company, in place of J. E. Thompson, Esq., resigned."

It has been shown above that everything done at that meeting of August 6, 1860, was a nullity, because the meeting was illegal, it having been held outside of the State of Texas, and no quorum having been present.

None of the witnesses who were connected with the Southern Pacific Railroad knew of Stevenson's election.

W. R. Loughery and Jason C. Wilson, who were both directors, and who were two of the three persons alleged to have been present at that meeting, denied knowledge of Stevenson's election as president. Record, pp. 280, 775.

W. T. Scott, the vice-president (Record, p. 244); E. A. Blanche, stockholder and engineer (Record, p. 267); and Hynson, superintendent of the road (Record, p. 216), are all without knowledge of his election.

Besides all this, Stevenson was not at the time eligible

as president of the company, because he was not a stockholder.

The charter of the company provided that the government and direction of its affairs should be vested in a board of not less than six directors, who should elect one of their own number president, and no person should be eligible as director unless the owner of at least five shares of stock.

Article 8 of the by-laws (Record, p. 838) provided that stockholders may cast one vote for each share of stock, provided the stock so voted shall have been transferred upon the books of the company.

Stevenson testifies (Record, p. 538):

"I have 49 shares here, which it seems from the transfer that I have had since 1857; the transfer is dated at this time."

This stock would not qualify him for election, because the Southern Pacific Railroad Company of 1857 was not the company of which he was elected president.

He says further (Record, 539):

"I purchased from Dr. Fowlkes $100,000 or $112,000 of stock of the Southern Pacific Railroad Company previous to the meeting of the board that elected me president, not very long previously to my being made president."

On the other hand A. T. Smith, clerk of the company, testifies (Record, 274): "I do not know that Stevenson did hold any stock in said company. The company kept a stock-book during my connection with the road, which stock-book I bring into court and is here shown. The stock-books of the Southern Pacific Railroad Company do not show any transfer of stock to V. K. Stevenson from any one."

The fact is thus established that Stevenson was never duly elected president of the Southern Pacific Railroad Company. There could, therefore, have been authority in

no one. It follows that any transfer to him of bonds in any amount was unlawful.

Even if he had been president, he was not entitled to receive from the company the 100 bonds. No authority is shown for the delivery to him of that amount of bonds, and no contract is proved which imposed upon the company the obligation of delivering them to him.

A by-law (Record, 844) provides:

"The salaries of all the officers, heads of departments, and agents of the company, excepting directors, shall be fixed by vote of the board of directors, and no extra allowance for any service performed by any such officer shall be made without the concurrence of the board."

The complainant offers no evidence at all to show that his salary was fixed in pursuance of this by-law.

W. T. Scott, vice-president of the road, says (Record, 243):

"I never heard, while I was director of the road or otherwise connected with the road, by report from a committee or from any other person, in writing or otherwise, that a contract had been made with Mr. V. K. Stevenson, the complainant in this case, to give him a bonus of $100,000 to accept the presidency of the road."

The complainant testifies (Record, 551):

"The other one hundred of the bonds were handed me by Dr. Fowlkes. I don't recollect the date; I can only give it. It was some time after I returned from France, in February, 1861, and several months thereafter, I think, Dr. Fowlkes and other members of the board—Richardson, I know, and probably Tate—beset me again to take $100,000 of the bonds as a bonus and $10,000 of salary a year in place of $30,000 a year originally agreed to be given. * * * I agreed, after many evenings of talk over the matter, to take the bonds. * * * Then Dr. Fowlkes, in the presence and with the assent of the executive committee, delivered me the bonds."

There is thus a complete failure on the part of the complainant to show any right as against the company to the one hundred bonds, and the act of Fowlkes in giving him the bonds was entirely unauthorized.

In regard to forty-eight of his bonds the complainant has made several statements.

In the original bill (Record, 10) he says that he became owner of them for valuable consideration.

In the first amended bill he says that when the 48 bonds were placed in his hands he was authorized, in the event the notes on which he was indorser were not paid at maturity, to sell and dispose of them to raise money to meet said notes, and that on payment of the notes he elected to take the said bonds in payment for the money paid out by him for the company. Record, 151.

In the second amended bill he says (Record, 185) they were placed in the hands of Schuchard & Gebhard as collateral security to secure the three notes, and that he became possessed of them when he paid the notes.

The latter statement he repeats in his testimony. Record, 550.

Whatever claims he may have had as president against the road, the bonds could not be used in satisfying such claims, and as matter of fact he had no valid claim in that respect.

He is in no better position in regard to the 48 bonds pledged as security to Schuchard & Gebhard and afterwards transferred to him. Those bonds were subject to a trust that they could only be applied for the purposes of construction.

The burden is upon him of showing that they were so applied, and having entirely failed to do so, he is in no position to maintain his suit upon those bonds.

It is a familiar rule in equity that a trustee dealing with himself or appropriating the trust property is bound to show not merely a valuable consideration, but show that he made

adequate consideration, and that the transaction was for the benefit of those whom he represents.

In the account filed by him as an exhibit to his original bill, (Record, 53,) the complainant admits a receipt from the company of cash on account on the 18th of October, 1860, of $6,000.

He says in his testimony (Record, 555): "I think that the $6,000 credited in the account October 18, 1860, was received by me from Dr. Fowlkes just about the time I started to Europe, and that he paid me out of the money borrowed from Schuchardt & Gebhard, as it was about that time that he received the money from them, and I am satisfied that he had no other money at that time."

So far, therefore, as there is any evidence in the record of the appropriation of the proceeds of the Schuchardt & Gebhard notes, it shows that a part of the fund went into the hands of the complainant for his own use. The evidence is his own admission.

The balance of the fund still remains unaccounted for.

VI.

The case of William H. Smith.

What has been said in relation to the Stevenson case is in the main applicable to that of Smith.

He never had any shadow of equity except upon the violent assumption that the mortgages could be upheld upon the ground that the bonds were issued for the purpose of construction.

There are considerations not adverted to which dispose of the Smith case.

Before the sale of September 3, 1861, Smith knew it was inevitable, and was present at the meeting at the residence of Fowlkes in Memphis, where the condition of the company was discussed, and where it was agreed that Fowlkes should supply the funds and the persons assembled

should purchase the property. Dep. Blanche, Record, 253.

Immediately after the sale he was, as he testifies, informed of it by Holman. Record, 482.

He knew perfectly well that the sale cut out the mortgages, or that, whether such was the legal effect of the sale or not, the company formed after the sale repudiated the mortgages, and was acting independently of them and claiming title superior to them.

He complained to Holman of the sale, but acquiesced on being told that his interest would be protected. See his dep., 482.

He avails himself of the offer of the new company to pay the debts of the preceding company. He enters into negotiations with such new company in relation to his own debt, and on the 2d of July, 1862, actually made a settlement with the new company. That settlement was in full of all demands.

He was with Holman when the circular was issued announcing on what conditions the old stockholders would be admitted. Record, 483.

He worked under the new company. He stood by and saw the new company receive the land and bonds due upon the completion of the first twenty-five miles of the road. Record, 484.

What next? He made a settlement with the new company for work done under the preceding company, and also under the new.

In that settlement he received from the new company United States bonds and twenty-one sections of land. These bonds and this land did not belong, as Smith well knew, to the company from which he took them, if the mortgage was not cut off by the sale.

He also became a stockholder in the new company by accepting under the settlement $5,000 of stock.

He negotiated in behalf of the new company the lease

from the Vicksburg, Shreveport and Texas Railroad. He also opened negotiations in behalf of the new company with M.M. Bellot des Minieries & Co. He also reported to the new company in 1866 what progress he had made in said negotiations, and obtained authority to go, and actually went, to France and concluded a contract under the authority of the new company. Record, 492, 493.

But it is needless to pursue this matter further. Suffice it to say that in every possible way he acquiesced in the sale and recognized the new company. Indeed, he was one of it.

The operations of the new company were absolutely irreconcilable with the mortgages in question.

This is the man who now has the unblushing audacity to assert that there was no sale and no new company.

The answer is plain. If there was fraud in the sale, he knew of it in advance. He knew of it afterwards and shared the spoils, and cannot at this late day, after the property has passed into the hands of innocent purchasers, be heard to question the title.

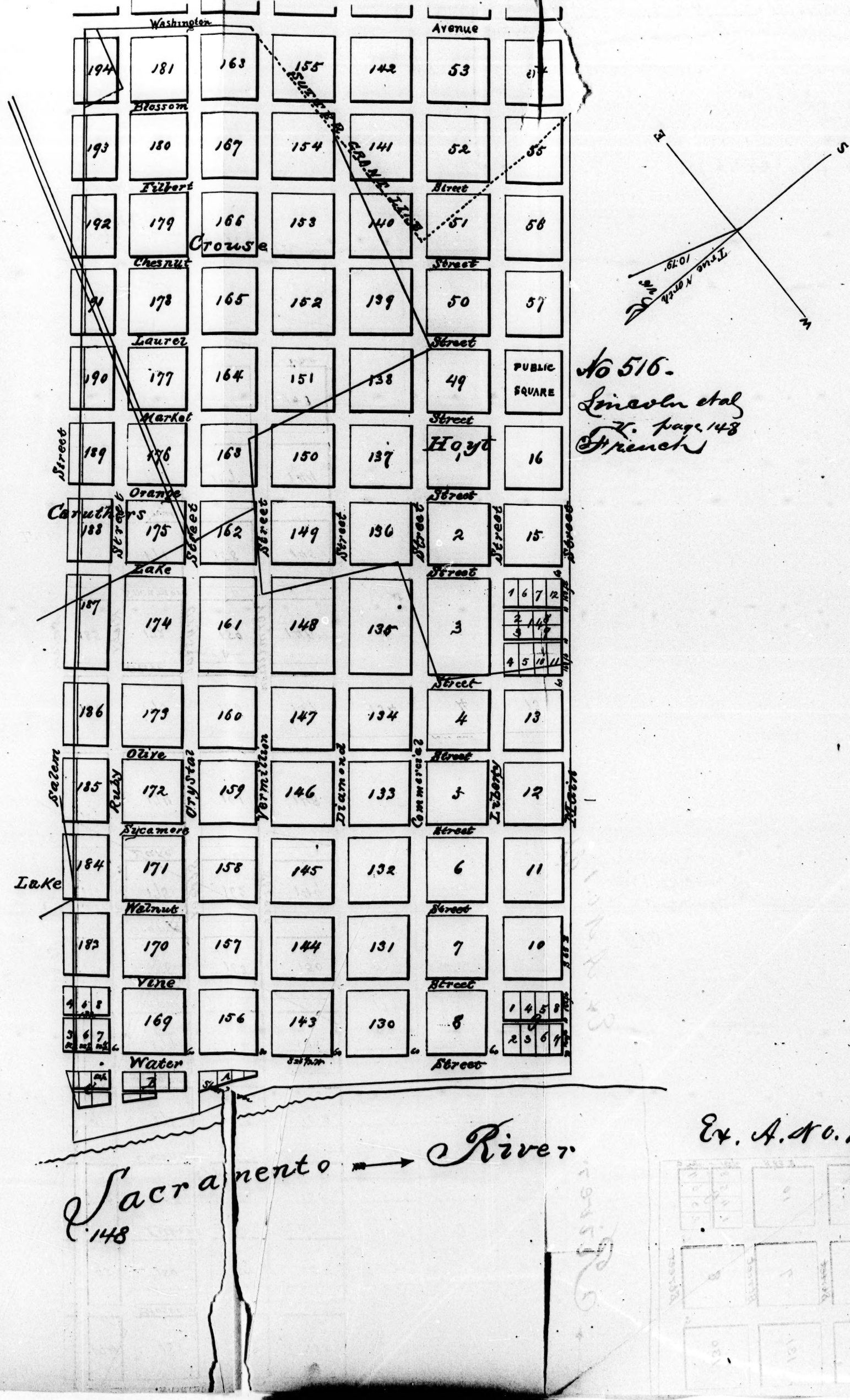
Special attention is called to his own deposition. He pretends he was coerced into the settlement. This pretense is set up after the lapse of twelve years. But to show its falsity, see dep. A. T. Scott, Record, 276, 277; dep. W. T. Scott, Record, 237, 241, 242; dep. E. A. Blanche, Record, 256; dep. J. M. Waskom, Record, 237.

Again, he pretends the settlement did not embrace the bonds he held. But see to the contrary the testimony last referred to.

His evidence stands alone entirely unsupported.

Note also the delay and acquiescence.

W. D. DAVIDGE,
JAMES LOWNDES,
Of Counsel for the Texas and Pacific Railway Company.



No 516.
Lincoln et al
V. Page 148
French

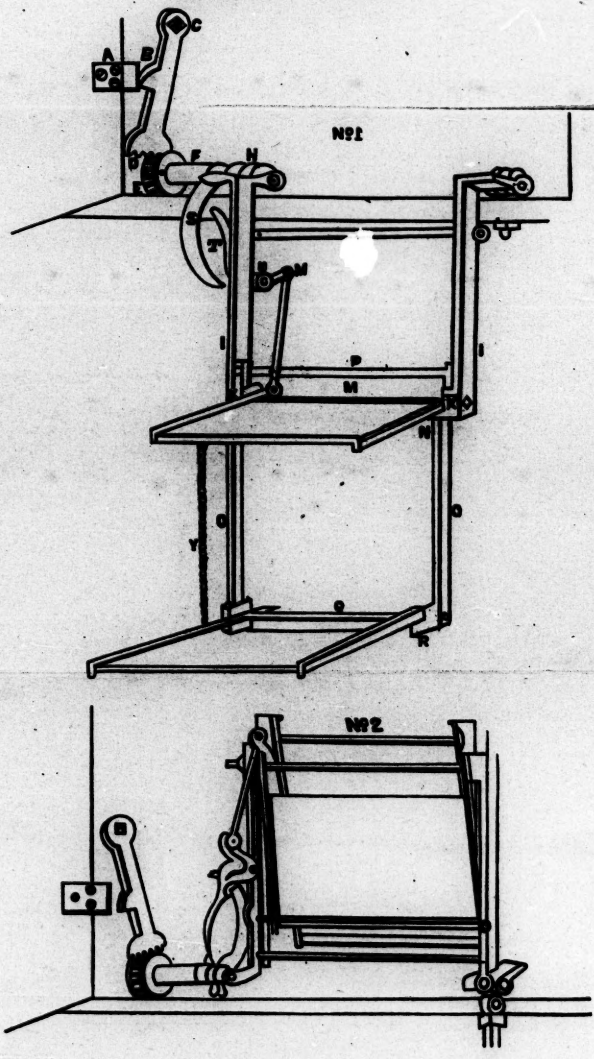
148

Ex. A. No. 1 L.S.

No. 224
Bridge Beach & Co.
v.
Boston Manufg Co.
} pages 58.

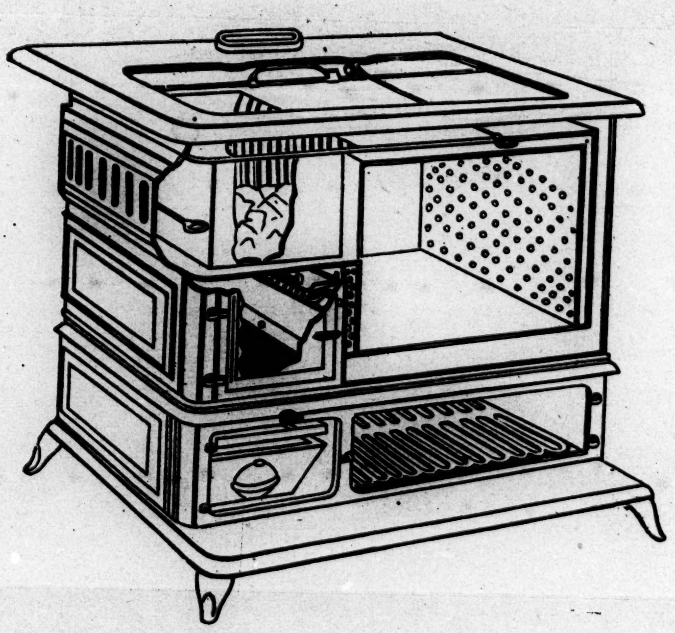
ENGLISH LETTERS PATENT GRANTED EDWARD THOMASON, DATED OCTOBER 31, 1796, No. 2,142.

CARRIAGE STEPS.



BURKE'S DRAWING.

No. 224
Bridge Beach Co.
v.
Excelsior Manufg Co
Sept 95



ENGLISH LETTERS PATENT GRANTED EDWARD THOMASON, DATED ON OR ABOUT DECEMBER 22, 1798, No. 2,282.

CARRIAGE STEPS.

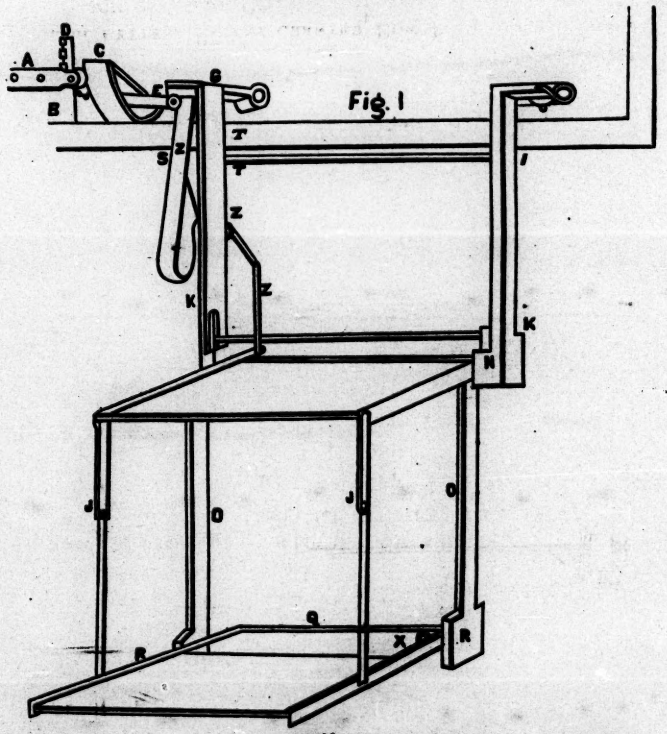


Fig. 1

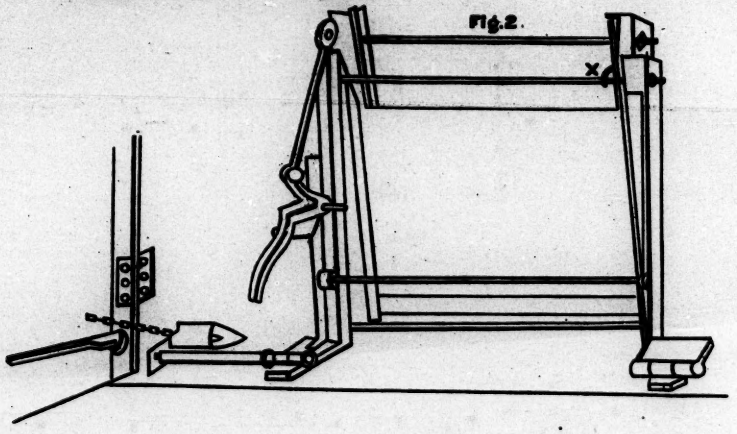


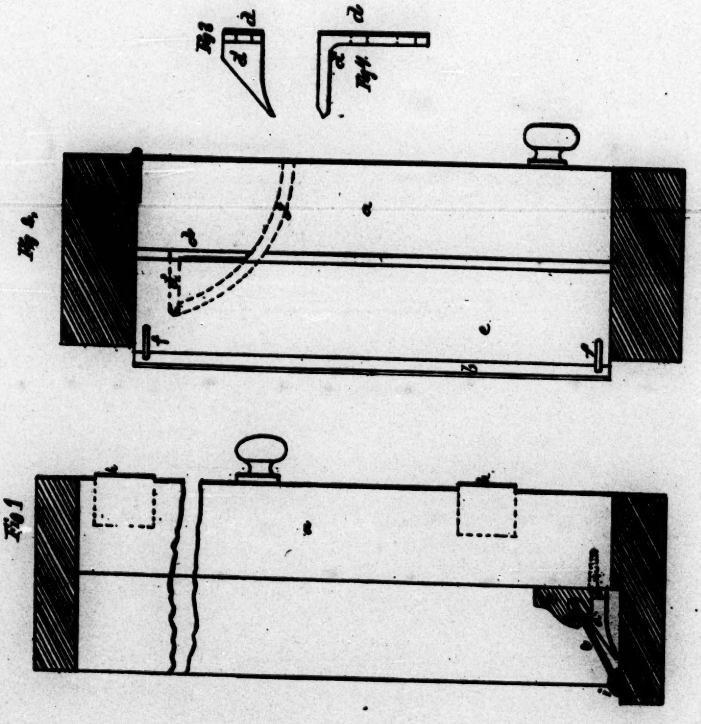
Fig. 2.

No. 334
Briggs Reader & Co.
v.
Eastern Manuf'g Co.
} Page 64.

H. W. Carew,

Weather Strip.

No. 94,472. Patented Sept. 7, 1869.



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v.
Excelsior Manufg Co.
} page 69.

Witnesses
J. H. Brandall
A. B. Fuller

Henry W. Carew
Inventor.

Daniel B. Paris' Improvements in Cooking Stoves.

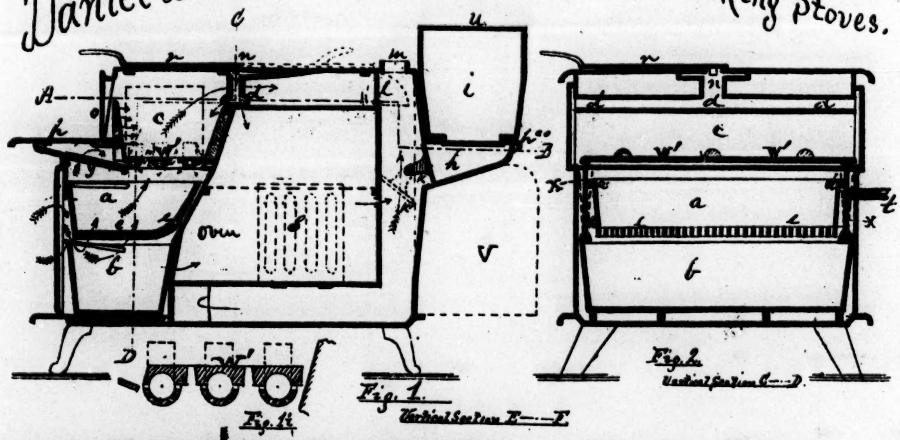


Fig. 1.

Fig. 2.

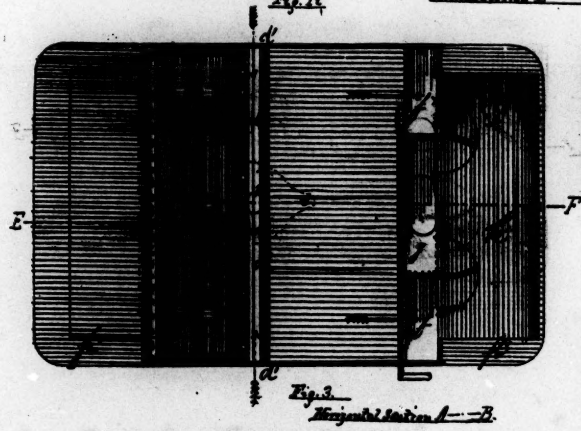
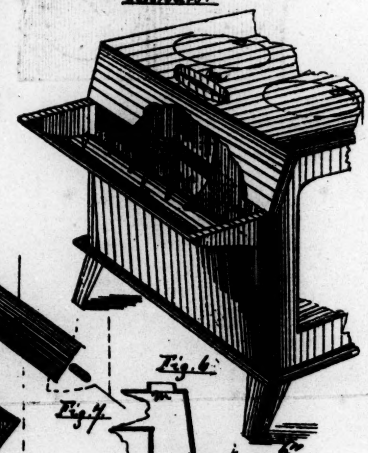


Fig. 3.

Fig. 4.



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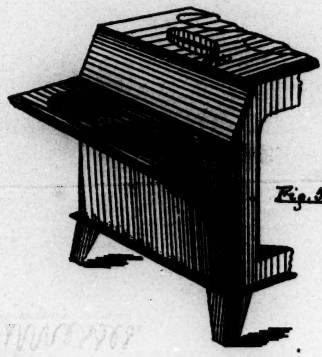

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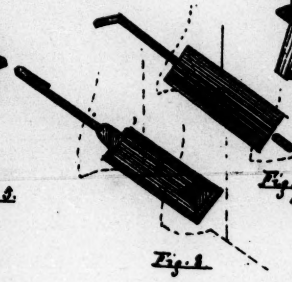

Fig. 7.

Fig. 8.

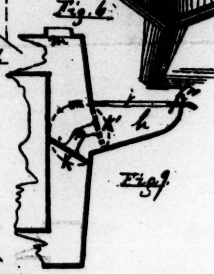

Fig. 9.

Witnesses.
Merit E. Cass
Wm. H. Hoeren.

Inventor.
David E. Paris
Per M.F.

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Bridge Beach & Co.
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Excelsior Manuf'g Co.
} Page 77.

Sheet 1.

Daniel E. Paris' Improvements in Cooking Stoves.

PATENTED APR 11 1871.

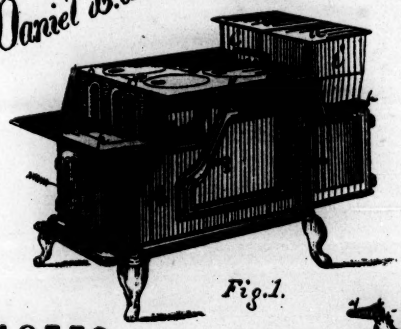


Fig. 1.

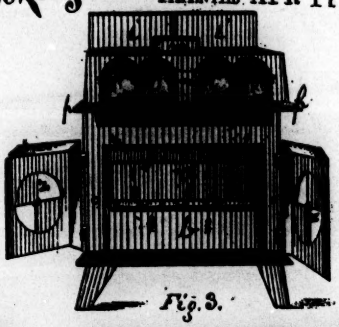


Fig. 8.

113556

Fig. 10.

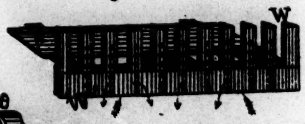
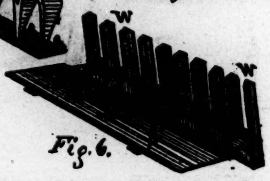


Fig. 4.

Fig. 5.



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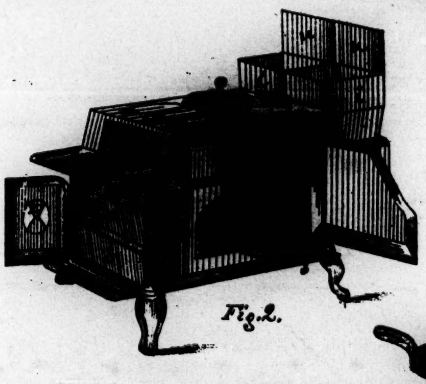
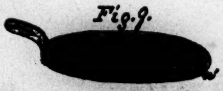


Fig. 2.



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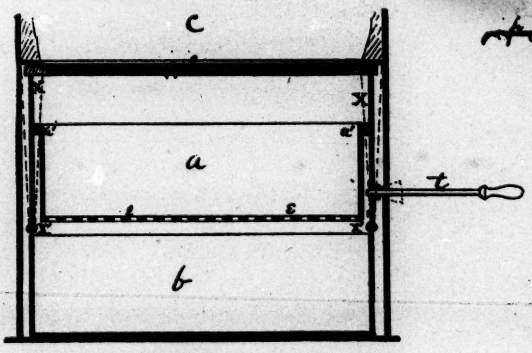

Fig. 3.

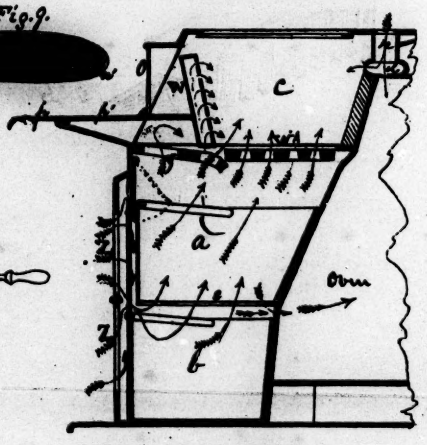

Fig. 7.

Witnesses.
Merit E. Paris
Wm. H. Wilson

Inventor.
Daniel E. Paris
Troy, N. Y.

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[105.]

JACOB V. VROOMAN.

Improvement in Stove Covers for Fuel Reservoirs.

No. 119,434. Patented Sep. 26, 1871.

Fig. 1.

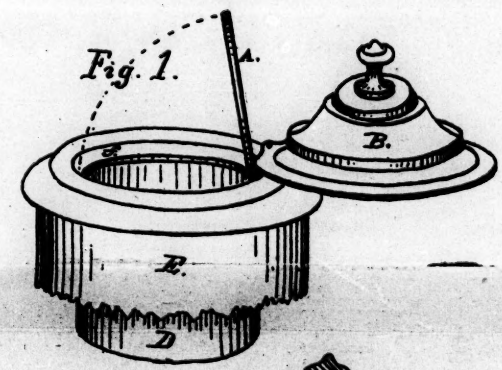
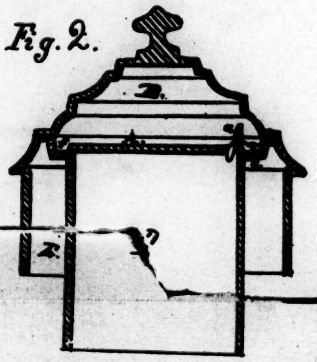


Fig. 2.



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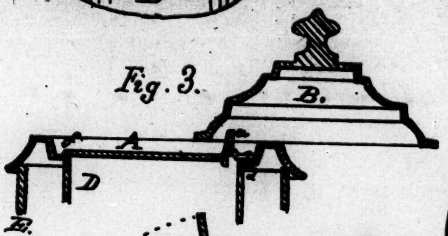

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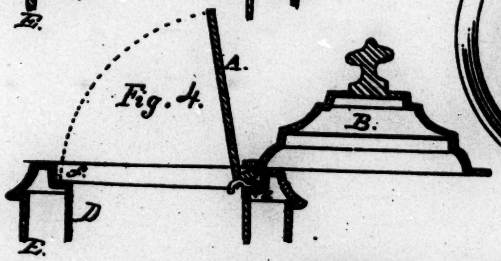

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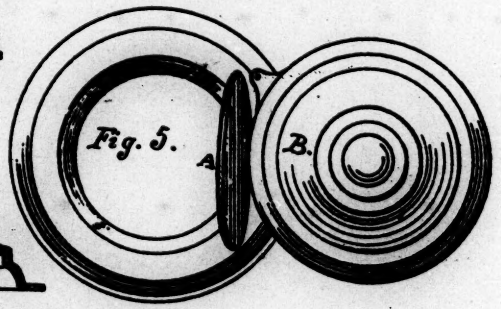

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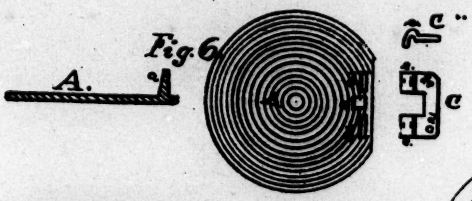

Inventor,

Jacob. V. Vrooman

Witnesses:

Jonas H. Clute

Thomas Houghton.

No. 2 of Bridge Beach & Co. v. Excelsior Manufg Co. page 83.

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Bridge Beach Co.
v.
Excelsior Manuf'g Co.
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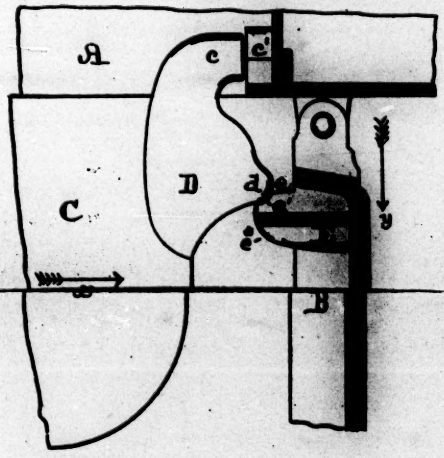
2 Sheets—Sheet 1.

E. C. LITTLE & D. H. NATION.

Stove Oven-Shelf.

No. 205,754. Patented July 9, 1878.

FIG. 1



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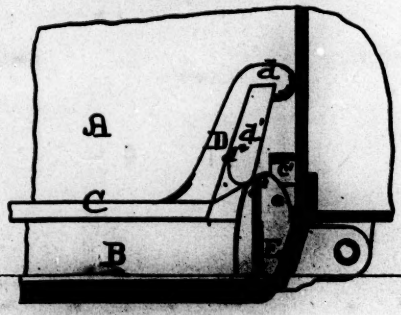
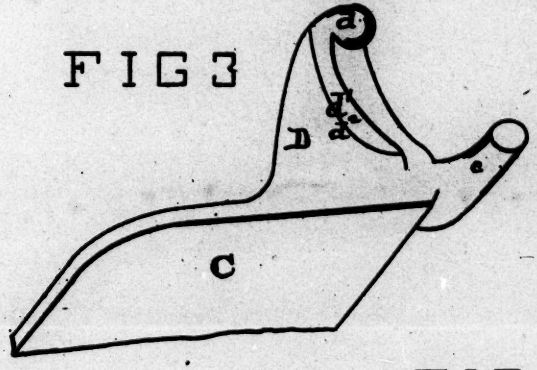


FIG 3



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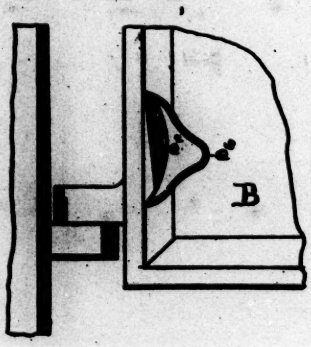

FIG. 5.

ATTEST.

J. L. Jones.

Lewis N. Boyd

INVENTOR.

Ezekiel C. Little
David H. Nation
by Chas. A. Moody.
atty.

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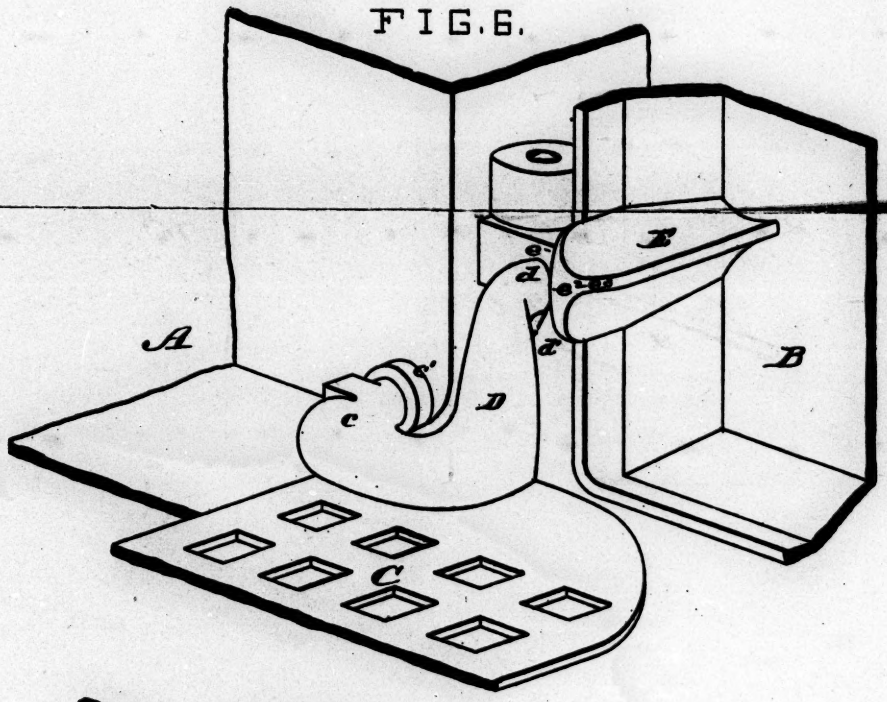
2 Sheets—Sheet 2.

E. C. LITTLE & D. H. NATION.

Stove Oven-Shelf.

No. 205,754. Patented July 9, 1878.

FIG. 6.



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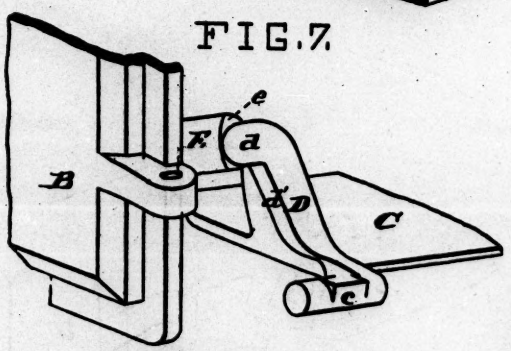
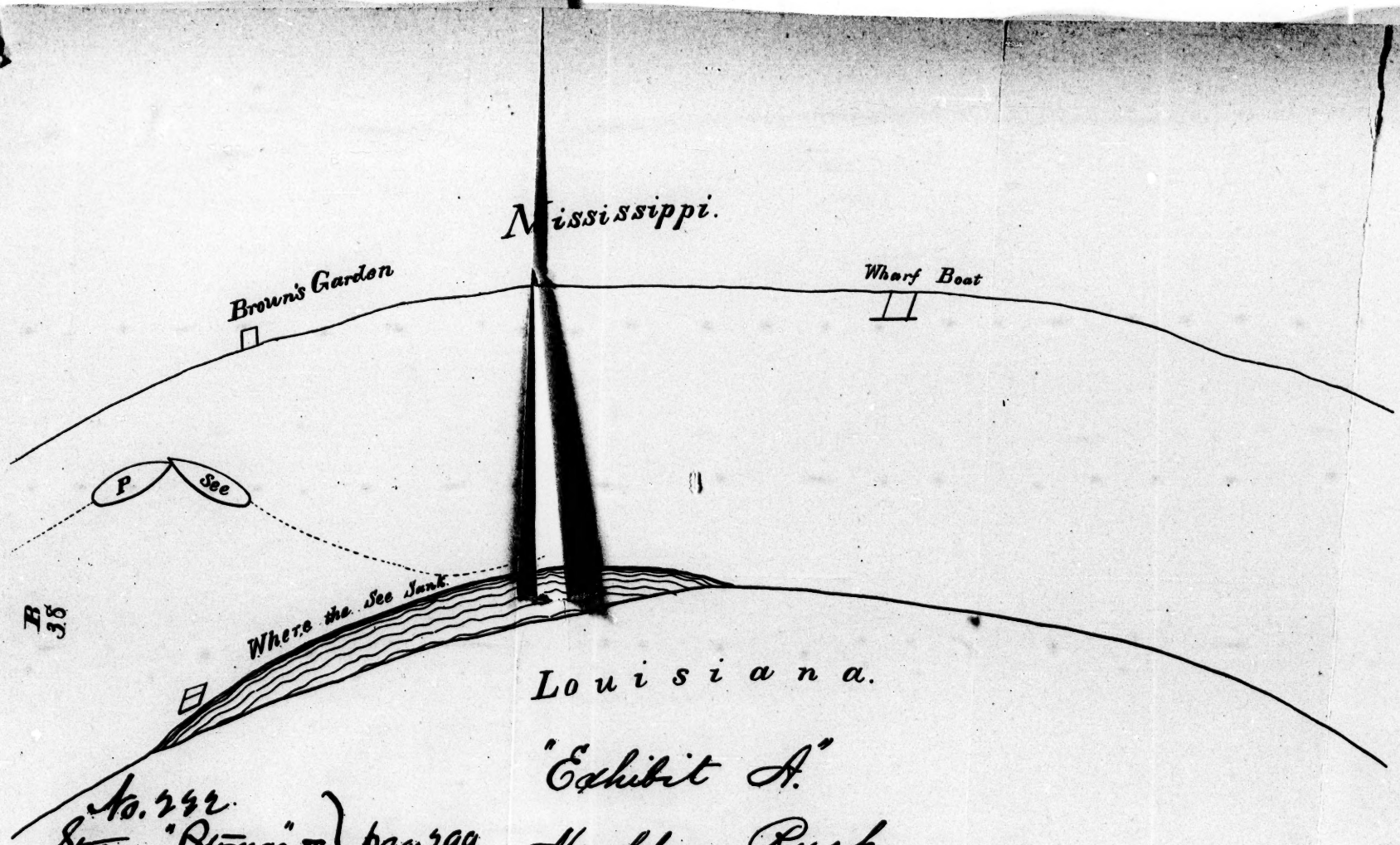


ATTEST.
D. W. Alexander
Paul Bakewell

INVENTORS.
Ezekiel C. Little.
David H. Nation.
by Chas. D. Moody,
atty.

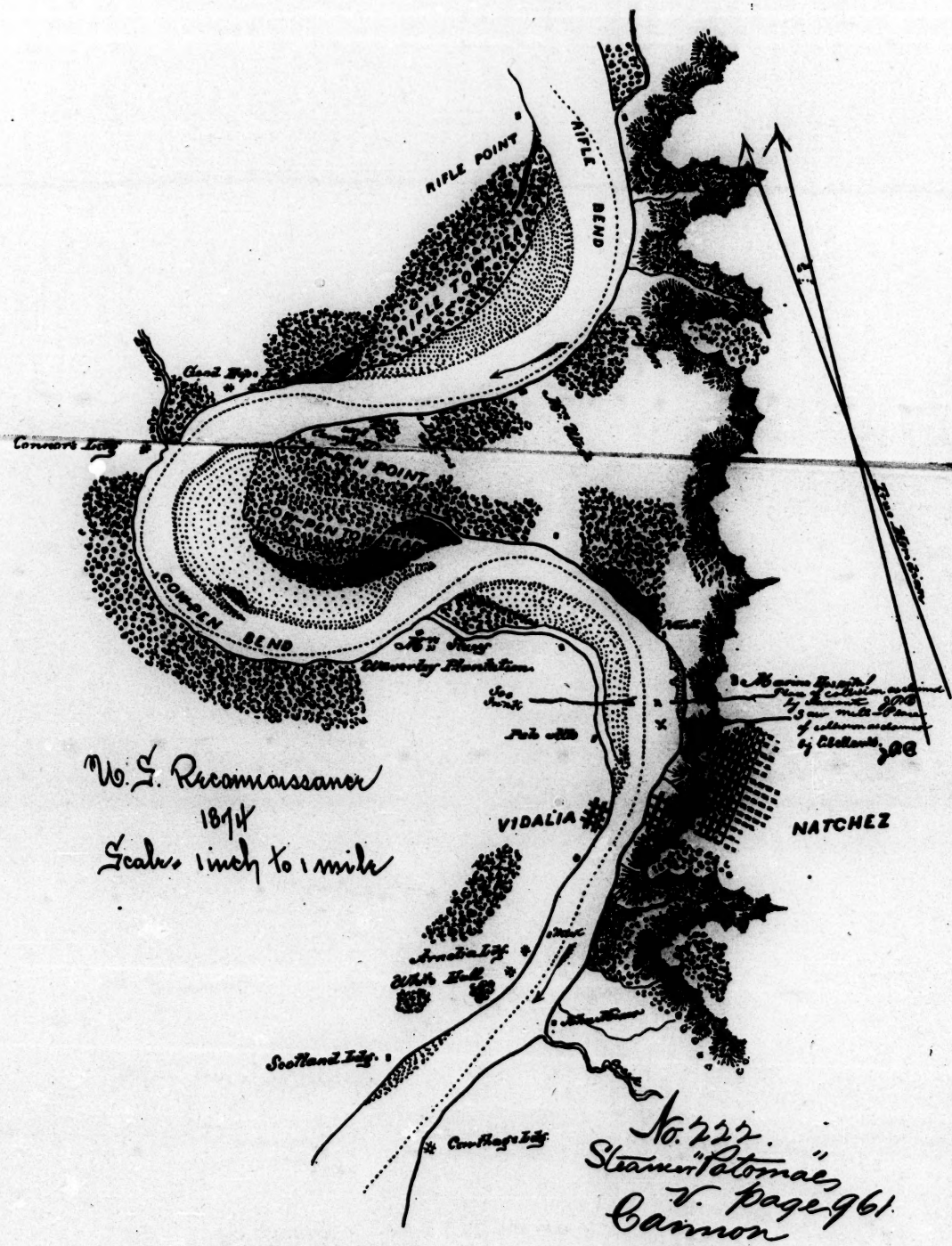


"Exhibit A"

Mahlon Rush

(Signed) R. S. Fulton
Cl. S. Court

No. 242
Steamer "Potomac" &c.
v.
Cannon
} page 299.



U. S. Reconnaissance
1874
Scale. 1 inch to 1 mile

No. 227.
Steamer "Potomac"
V. page 961
Cannon